No. 81-6756

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

MELVIN E. TUTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

Whether a conviction for which a youth serves a term of probation pursuant to section 5010(a) of the Federal Youth Corrections Act, and receives an unconditional discharge from the program, may be used years later as the basis for imposing a recidivist felony penalty.

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The petitioner, Melvin E. Tuten, prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered on March 30, 1982.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 440 A.2d 1008, and is set out below in the Appendix at pp. 1a-6a. The per curiam Order of that court, denying Tuten's petition for rehearing en banc, is not reported. That Order is set out below in the Appendix at page 18a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 10, 1982. A petition for rehearing en banc was denied on March 30, 1982, and is set out in the Appendix at page 18a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

A. The Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. (1976). Pertinent provisions are:

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

* * *

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

B. 22 D.C. Code § 3204. Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever

violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

C. 23 D.C. Code § 111. Proceedings to establish previous convictions

(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years, unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) If the prosecutor files an information under this section, the court shall, after conviction but before pronouncement of sentence, inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information and shall inform him that any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c)(1) If the person denies any allegation of the information of previous convictions, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the Government to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwide provided

in paragraph (2) of this subsection, the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a previous conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose sentence upon him as provided by law.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence has been pronounced and a final judgment of conviction entered.

STATEMENT OF THE CASE

On November 16, 1970, Melvin E. Tuten, petitioner, then nineteen years old, was found guilty in the District of Columbia Court of General Sessions of carrying a pistol without a license (22 D.C. Code § 3204). He was sentenced under the Federal Youth Corrections Act (FYCA), 18 U.S.C. § 5005 et seq.(1976), and placed on probation for two years (18 U.S.C. § 5010(a)). Following that two-year probationary period, Tuten was discharged unconditionally from the FYCA program. Tuten did not apply for a certificate setting aside his FYCA conviction, as is provided in section 5021(b) of the Federal Youth Corrections Act, and no such certificate was issued by the sentencing judge.

Tuten had no further difficulty with the law until November 24, 1979. On that date, he was arrested and charged with carrying a pistol without a license. At a preliminary hearing held on December 3, 1979, however, the court found no probable cause and Tuten was discharged.

Seven months later, on June 19, 1980, a two-count indictment was filed charging Tuten with assault with a dangerous weapon (a stick) and carrying a pistol without a license. Both offenses were allegedly committed on November 23, 1979.

Sometime after October 1, 1980, the Government informed the court below, pursuant to 23 D.C. Code § 111, that Tuten had previously been convicted of carrying a pistol without a license and was therefore subject to the increased, recidivist penalty provided by section 3204. The previous conviction relied upon by the Government in its information was the 1970 offense for which Tuten had been sentenced under the Federal Youth Corrections Act. The increased penalty provided in section 3204, in effect, makes the possession of an unlicensed gun a felony rather than a misdemeanor.

Tuten's trial began on November 26, 1980. The following day, the jury found him not guilty of assault with a dangerous weapon, but guilty of carrying a pistol without a license. Sentencing was originally scheduled for January 5, 1981. Following a brief meeting on that date, however, sentencing was postponed to allow for the completion of another separate and subsequent criminal proceeding in which Tuten was the defendant before the same judge. At the abbreviated January 5 hearing, trial counsel first raised the issue of whether Tuten could properly be charged as a recidivist based on his prior FYCA conviction.[1/]

1/ The transcript of this discussion is contained in the Appendix, pp. 7a-10a.

On January 26, 1981, notwithstanding a favorable pre-sentence report, over objection by trial counsel that use of the recidivist penalty was wrong, and after the Government misrepresented Tuten's prior criminal record,[2] Tuten was given a felony sentence of not less than two nor more than six years. The sentencing judge remarked at the time that the question of whether a repeat-offender sentence could be imposed on the basis of a prior FYCA conviction would be "an interesting point for the court of appeals." (Tr. 6, App. 16a.)

REASONS FOR GRANTING THE WRIT

I. The Decision Below Affirming the Trial Court's Imposition of a Recidivist Sentence Conflicts Directly with the Decision of the United States Court of Appeals for the Fifth Circuit in Which that Court Rejected an Effort to Use a Prior FYCA Conviction as the Basis upon Which To Impose a Recidivist Penalty.

In United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086, John Arrington was convicted of violating 18 U.S.C. App. § 1202(a)(1)(1976), a law similar to D.C. Code § 22-3204, which forbids the possession of firearms by a convicted felon. The sentence Arrington had served for the prior felony conviction on which the violations of section 1202 were based was the maximum term of custody provided by section 5010(b) of the FYCA, six years of treatment and supervision. Following completion of that six-year term, Arrington had been unconditionally discharged.

2/ The prosecuting attorney, without any basis in fact, suggested that Tuten had a long history of criminal activity, stating Tuten's "record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests." Sentencing Transcript, p. 5 (App. 15a), emphasis added. The transcript of the January 26, 1981 sentencing proceeding is reproduced in the Appendix at pages 11a-17a. Citations will be made to the original Transcript and to the Appendix page.

Given the nature of the underlying conviction, Arrington appealed the section 1202 recidivist conviction, arguing that since he had been given an unconditional discharge following his completion of the FYCA sentence imposed for the prior felony, "he no longer bore the onus of that conviction and consequently should not have been charged [as a previously convicted felon.]" 618 F.2d at 1121. In making this argument, Arrington relied upon section 5021(a) of the FYCA which provides for the issuance of a certificate setting aside the conviction of a committed youth offender who was unconditionally discharged from supervision "before the expiration of the maximum sentences imposed upon him."

Although the language of section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them, the Fifth Circuit (Fay, J., in which Wisdom and Tate, JJ., joined) agreed with Arrington and held that his unconditional discharge following satisfactory completion of an FYCA sentence less than that which could have been imposed under the provisions of the FYCA entitled him to the benefits of section 5021(a).

> Having a broad range of sentencing options available, the trial court in Arrington's case would have taken into account the mandatory discharge provision before choosing the appropriate sentence. As a matter of discretion, the judge could have sentenced Arrington to probation under 18 U.S.C. § 5010(a) (1976). Alternatively, he could have sentenced him under section 5010(c) to treatment for longer than six years, up to the maximum adult offender sentence for the offense charged. Finally, the trial court could have chosen not to sentence Arrington under the Youth Corrections Act, but rather as an adult offender. 18 U.S.C. § 5010(d)(1976). The trial judge considered all these options and chose to sentence under section 5010(b), which has a maximum sentence of six years. . . . Expunction of Arrington's conviction was clearly automatic after his unconditional discharge at the end of six years.
>
> • • •
>
> Not only does the clear statutory language command this result, but so also does the policy underlying the Youth Corrections Act.

618 F.2d at 1123-24; citations omitted.

The court determined that this result was dictated by the purposes of the FYCA, concluding (618 F.2d at 1124; citations and footnotes omitted):

> The Youth Corrections Act actually operates to remove certain youthful offenders from the realm of those persons who have been convicted of a felony. The Act's import is to remove the taint of youthful indiscretions, giving a youthful offender a second chance to live free of the lifelong ignominy of a criminal record. If a youthful offender has been unconditionally discharged, the disabilities of a criminal conviction are completely and automatically removed; indeed, the conviction is set aside as if it had never happened.

Thus the court ruled that satisfactory completion of the FYCA sentence imposed upon Arrington has erased that prior felony conviction, at least so far as the application of a recidivist penalty provision such as section 1202 is concerned.

In United States v. Villar, 416 F. Supp. 886 (S.D.N.Y. 1976), and United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980), it was also held that youth offenders who complete probationary terms imposed under the FYCA are entitled to be free of the taint of a prior conviction. In Sinkfield, the court stated that "upon successful completion of his probationary period, defendant Sinkfield will be entitled to a certification, pursuant to 18 U.S.C. § 5021 setting aside his conviction," 484 F. Supp. at 598. In Villar the court found that the defendant's conviction "would be automatically set aside upon his discharge from probation." 416 F. Supp. at 889.

Compare the law of the Fifth Circuit with what now appears to be the law of the District of Columbia. Section 5021(b) of the FYCA provides the same set-aside benefits for those sentenced to probationary terms as section 5021(a) does for those whose FYCA sentences involve more serious detention. Like Arrington, Tuten contends that having been unconditionally discharged from the FYCA program upon the completion in 1973 of his probationary term, he no longer bore the onus of that conviction and could not, in 1980, be charged as a repeat defender.

The court below refused to accept this result, but made no effort to distinguish Arrington, merely dismissing it as based on "unpersuasive authority . . ." and contrary to the legislative history of the set-aside provision. The court below bases this latter contention, however, on House Report language that is perfectly consistent with Arrington and supportive of petitioner's position:

> The report states that the youth offender must be discharged "unconditionally on or before the expiration of the maximum term fixed by the sentencing judge."

440 A.2d at 1010-1011 (first emphasis added, second in text; citations and footnotes omitted), App. 3-4a.

There could not be a more direct conflict between the law of the Fifth Circuit and the law of the District of Columbia. Nor can the need for review be more compelling: Tuten, who was given the mildest type of sentence provided by the FYCA is jailed as a recidivist; Arrington, who committed a felony and served a term three times as long as Tuten's, is not. The confusion as to whether and when prior FYCA convictions may be used to trigger an enhanced recidivist penalty affects every state and every federal district court since recidivist statutes are present in the law of virtually every state as well as in federal law.[3/]

An established reason for the grant of certiorari is the presence of a direct conflict between the decision of a federal court of appeals and that of the highest court of any state where the conflict concerns federal questions. See Stern & Gressmen, "Supreme Court Practice," 5th ed. 1978, p. 280, and cases cited therein. Since this case involves the construction and effect given to the Federal Youth Corrections Act, an important federal issue is presented -- one that warrants review by the Court.

3/ On March 22, 1982, the Court granted review in the case of Dickerson v. New Banner Institute, Inc., No. 81-1180. The question presented in that case is whether or not the firearms disabilities imposed by the Gun Control Act, the same federal Act at issue in Arrington, are applicable to a person whose prior felony conviction was expunged under state law following successful probation. The Fourth Circuit held that the operation

[Footnote continued on next page.]

II. The Decision of the District of Columbia Court of Appeals Hampers Administration of the Federal Youth Corrections Act and Generates Confusion as to the Intent and Meaning of the FYCA.

This Court has held that an important question raised by the District of Columbia Court of Appeals' application of a federal statute to the District is a proper basis for the grant of certiorari. United States v. Beach, 324 U.S. 193 (application of the Mann Act to the District). In this case, the court below has construed the FYCA and a District of Columbia recividist statute in such a way that the purposes of the FYCA are defeated and the recidivist statute is imposed upon individuals never before subjected to or deserving of the harsh treatment provided by section 22-3204.

The Federal Youth Corrections Act was enacted in 1950 to provide a program of individualized attention for youthful offenders in the hope that by responsive early intervention, young people could be prevented from becoming habitual criminals. In Dorszynski v. United States, 418 U.S. 424, 432-3, the Court described the Federal Youth Corrections Act as the most comprehensive federal statute concerning sentencing and found that the FYCA was "designed to provide a better method of treating young offenders convicted in federal courts in that vulnerable age bracket [18-22] to rehabilitate them and to restore them to normal behavior patterns," Section 5021 is a "powerful tool" in this rehabilitation program, providing the means by which an offender's past criminal activity can be erased from his record. 418 U.S. at 434.

[Footnote continued from previous page.]

of the State law expungement precluded any subsequent use of the earlier felony conviction, citing Arrington as support by analogy. 649 F.2d at 220. Although the issue presented in the instant case is different than the question posed in New Banner, they are related to the extent of their reliance on the Fifth Circuit's decision in Arrington.

In affirming the propriety of Tuten's recidivist sentence, the court below declared:

> Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior-convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not.

440 A.2d at 1012, App. 5a. If this is true, then the Federal Youth Corrections Act and the policies it represents are meaningless.

The court below made the foregoing statement in the posture of construing section 3204 of the District of Columbia Code, but there is no basis for distinguishing this District of Columbia recidivist provision from the many other federal and state provisions authorizing enhanced penalties for recidivists. In all such situations, the basic question remains: Do past FYCA convictions subject an offender to being characterized as recidivist upon the commission of a later offense? The purposes of both the FYCA and recidivist penalty provisions are served by answering that question as the Fifth Circuit did in Arrington. The contrary negative determination reached by the court below leaves in conflict the law to be applied by sentencing judges and charging prosecutors throughout the country, resulting in uncertainty and confusion.

If for no other reason than to make clear the operation and effect of the FYCA, Tuten's petition should be granted.

CONCLUSION

The guidance of this Court is essential to ensure equitable and meaningful treatment for youthful offenders sentenced under the Federal Youth Corrections Act. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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other crimes evidence is admissible the general rule is that the trial court must instruct the jury as to the limited purpose for which such evidence is admitted.[7] *Miles v. United States*, D.C.App., 374 A.2d 278, 283 (1977). However, considering the overwhelming weight of the evidence that appellant possessed marijuana, it is clear that the jury verdict was not substantially swayed by the failure to instruct. Thus, the failure to give such an instruction was not plain error.[8] *See Watts v. United States*, *supra*, at 709.

The conviction is

Affirmed.

Melvin E. TUTEN, Appellant,

v.

UNITED STATES, Appellee.

No. 81-204.

District of Columbia Court of Appeals.

Argued Nov. 25, 1981.

Decided Feb. 10, 1982.

Defendant was convicted before the Superior Court, District of Columbia, Joseph M. F. Ryan, Jr., Trial Judge, of carrying a pistol without a license, and sentenced to enhanced prison term of two to six years. He appealed. The Court of Appeals, Kelly, J., held that: (1) under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and a set aside certificate issued to them, and (2) where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license.

Affirmed.

1. Statutes ⇐=207

A statute should not be construed in such a way as to render certain provisions superfluous or insignificant.

2. Infants ⇐=69(3)

Under Federal Youth Corrections Act, convictions are to be set aside only when youth offender has been given probationary sentence, a court in its discretion decides to discharge him from probation before term of his probationary sentence has expired, and discharge is unconditional. 18 U.S.C.A. § 5021(b).

3. Infants ⇐=69(3)

Time span for unconditional release from conviction under Federal Youth Corrections Act is measured by maximum sentence actually imposed, not by maximum possible sentence for that offense. 18 U.S.C.A. § 5021(b).

4. Infants ⇐=69(3)

Legislative history of Federal Youth Corrections Act indicates intent to use set aside provision of Act to give ex-offenders opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. 18 U.S.C.A. § 5021(b).

5. Infants ⇐=69(3)

While conviction under Federal Youth Corrections Act, may be officially set aside

7. *See* Criminal Jury Instructions for the District of Columbia, No. 2.49 (2d ed. 1972).

8. In light of the fact that appellant did not request that a limiting instruction be given, the standard of appellate review is whether plain error was committed. *See Miles v. United States*, *supra*, at 282. *See* note 3, *supra*.

in court records, set aside certificate has no effect on newspapers or other accounts of conviction. 18 U.S.C.A. § 5021(b).

6. Infants ⇐69(5)

Only those youth offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside under Federal Youth Corrections Act. 18 U.S.C.A. § 5021(b).

7. Infants ⇐69(5)

A court will discharge a youth offender under Federal Youth Corrections Act only when it concludes that rehabilitation is complete. 18 U.S.C.A. § 5021(b).

8. Infants ⇐69(5)

Federal Youth Corrections Act conviction must actually be set aside before expiration of probationary sentence imposed upon youth offenders. 18 U.S.C.A. § 5021(b).

9. Infants ⇐69(1)

Principal purpose of Federal Youth Corrections Act is to rehabilitate persons who are unusually vulnerable to danger of recidivism because of their youth. 18 U.S.C.A. §§ 5005 et seq., 5021(b).

10. Infants ⇐69(1)

Rehabilitation is substituted for retribution under Federal Youth Corrections Act as a sentencing goal. 18 U.S.C.A. §§ 5005 et seq., 5021(b).

11. Infants ⇐69(5)

To effectuate sentencing goal of rehabilitation, Federal Youth Corrections Act empowers trial judge with broad discretion to choose among available sentencing options. 18 U.S.C.A. §§ 5005 et seq., 5010(e), 5021(b).

12. Infants ⇐69(5)

Federal Youth Corrections Act allows trial judge to obtain extremely comprehensive presentence report. 18 U.S.C.A. § 5010(e).

13. Infants ⇐69(3)

Public policy strongly favors sentencing youths under Federal Youth Corrections Act whenever possible. 18 U.S.C.A. § 5005 et seq.

14. Criminal Law ⇐1202(1)

Since enhanced penalty under statute depends on type of prior conviction, not on type of sentence received for prior conviction, two persons with same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under Federal Youth Corrections Act and other was not. 18 U.S.C.A. §§ 5010(e), 5021(b).

15. Statutes ⇐188

Unless there are persuasive reasons to contrary, Court of Appeals must construe a statute according to ordinary meaning of its words.

16. Infants ⇐69(5)

Under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them. 18 U.S.C.A. § 5021(b).

17. Criminal Law ⇐1202(1)

When conviction has not been set aside, it may be basis of recidivist penalty.

18. Criminal Law ⇐1202(1)

Where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court, prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license. D.C.Code 1981, § 22-3204; 18 U.S.C.A. § 5005 et seq.

Linda S. Gillespie, Washington, D. C., appointed by the court, for appellant.

Lisa J. Stark, Asst. U. S. Atty., with whom Charles F. C. Ruff, U. S. Atty., and John A. Terry and Barry M. Tapp, Asst. U. S. Attys., were on the brief, for appellee.

Before NEWMAN, Chief Judge, and KELLY and NEBEKER, Associate Judges.

KELLY, Associate Judge:

Appellant was convicted by a jury of carrying a pistol without a license in violation of D.C.Code 1981, § 22-3204, and, on January 26, 1981, was sentenced to a prison term of two to six years. The issue on appeal is whether a felony recidivist sentence may be imposed on the basis of a prior Federal Youth Corrections Act (FYCA) conviction. 18 U.S.C. § 5005 *et seq.* (1976).

Appellant, on November 16, 1970, had previously been sentenced under the FYCA to two years probation for carrying a pistol without a license. He was discharged unconditionally at the end of the two years. Appellant did not apply for a certificate setting aside his conviction, and no such certificate was issued by the court. Appellant (in this case) was again found guilty of carrying a pistol without a license on November 25, 1980. Pursuant to D.C.Code 1981, § 22-111, the prosecutor informed the trial court of the earlier conviction which made appellant eligible for an enhanced penalty under D.C.Code 1981, § 22-3204. Based on the earlier conviction, appellant was sentenced as a felon rather than as a misdemeanant.

To determine whether a FYCA conviction may be the basis for a felony recidivist sentence, we look first to the language of the statute itself. *Lewis v. United States*, 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980); *Davis v. United States*, D.C.App., 397 A.2d 951, 956 (1979). The FYCA provides in 18 U.S.C. § 5021(b) that

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

[1] Appellant contends that it was error to base his 1981 sentence on his prior FYCA conviction because that conviction should have been automatically set aside under § 5021(b). He argues that the plain language of the statute, its legislative history, and its purposes mandate an automatic set aside because he successfully completed the probationary sentence imposed upon him under the FYCA. However, the assertion that § 5021(b) mandates automatic set aside ignores the phrase "prior to the expiration of the maximum period of probation heretofore fixed by the court." A statute should not be construed in such a way as to render certain provisions superfluous or insignificant. *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 519–520, 99 L.Ed. 615 (1955); *Zeigler Coal Co. v. Kleppe*, 175 U.S.App.D.C. 371, 378, 536 F.2d 398, 405 (1976). Following appellant's interpretation of the statute would necessitate violating this fundamental rule of statutory construction.

[2] The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is unconditional.

[3] Appellant places primary reliance in his argument on *United States v. Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied*, 449 U.S. 1026, 101 S.Ct. 876, 66 L.Ed.2d 812 (1981). The *Arrington* court decided that a FYCA conviction is automatically set aside when the defendant is sentenced to any term less than the maximum available sentence and the defendant is unconditionally discharged, regardless of whether the discharge occurred before completion of the actual sentence imposed. Not only, in our judgment, does *Arrington* rely on unpersuasive authority, but also the House of Representatives Report makes clear that the time span for unconditional release is measured by the maximum sentence actually imposed, not by the maximum possible sentence for that offense. The report states that the youth offender must be discharged "unconditionally on or

before the expiration of the maximum term *fixed by the sentencing judge.*"[1] H.R.Rep. No.2979, 81st Cong., 2d Sess. 4 (1950) (H.R. Rep.), *reprinted in* [1950] U.S.Code Cong. Serv. 3983, 3986 (UCCS) (emphasis added).

[4-7] Appellant correctly asserts that the legislative history of the FYCA indicates the intent to use the set aside provision of the FYCA to give ex-offenders the opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. *Doe v. Webster*, 196 U.S.App.D.C. 319, 328, 382 n.51, 606 F.2d 1226, 1234-35, 1239 n.51 (D.C.Cir.1979); *Hearings on S 1114 and S. 2609 Before A Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 70 (1949) (Hearings) (Testimony of Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit), "This law blots out their sentence and lets them go without any stigma on their life...." *Id.* at 12. When a conviction is set aside, a certificate is issued to the youth offender. A particularly valuable benefit for offenders sentenced under the FYCA is the prospect of earning this certificate. *Durst v. United States*, 434 U.S. 542, 548, 98 S.Ct. 840, 842, 55 L.Ed.2d 14 (1978). When the opportunity for earning a set aside certificate was extended to youth offenders placed on probation in 1961, it was noted that this provision "provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record." 87 Cong.Rec. 8709 (1941) (Testimony of Mr. Dodd). While a conviction may be officially set aside in the court records, it has no effect on newspapers or other accounts of the conviction. *Doe v. Webster*, *supra* at 328, 606 F.2d at 1233. The certificate serves as handy evidence to prove to potential employers and others that the conviction has been eradicated by the good conduct of the offender. However, it is evidence that this opportunity was not intended for all those sentenced under the FYCA. Only those offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside. *See Watts v. Hadden*, 651 F.2d 1254, 1278 (10th Cir. 1981); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973). A court will discharge a youth offender only when it concludes that rehabilitation is complete. *See* H.R. Rep. at 9, UCCS at 3982; S.Rep.No.1180, 81st Cong., 1st Sess. 2, 11 (1949) (S.Rep.); Hearings at 45 (Testimony of U.S. Circuit Judge John J. Parker).

In discussing the differences between a criminal conviction and one that can be automatically set aside under the FYCA, the court stated in *Tatum v. United States*, 114 U.S.App.D.C. 48, 51, 310 F.2d 854, 857 (1962): "[A] person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record.... [I]t can, by the choice and conduct of the individual, become a noncriminal episode so far as the public records are concerned."

[8] Most importantly, the conviction must actually be set aside before expiration of the probationary sentence imposed upon the youth offender. Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia stated that "committed youth offenders who earn their

1. *Arrington* cites *United States v. Ferguson*, 565 F.2d 1270 (4th Cir. 1977), *United States v. Fryer*, 548 F.2d 11 (5th Cir. 1976), and *Minshew v. United States*, 410 F.2d 208 (5th Cir. 1969). *Ferguson* is unpersuasive authority because the defendant's FYCA sentence was set aside prior to the expiration of his actual probationary sentence. *Fryer* merely holds that a FYCA conviction which has been set aside cannot constitute a conviction for purposes of 18 U.S.C.App. § 1202(a) [illegal possession of firearm by a convicted felon] or 18 U.S.C. § 922(a)(6) [making false statement when buying a firearm]. *Minshew* provides, "In the event that he is unconditionally discharged before the expiration of his maximum sentence, the conviction will automatically be set aside. 18 U.S.C. § 5021." *Id.* at 207. None of these cases discuss the maximum available sentence in relation to the actual sentence imposed.

United States v. Viller, 416 F.Supp. 857, 859 (S.D.N.Y.1976), is the only case which supports *Arrington's* interpretation of § 5021. It states in dicta, "If he were to be convicted as a Young Adult Offender, however, his conviction would be automatically set aside upon his discharge from probation. 18 U.S.C. § 5021." *Viller* does not explain or elaborate on this statement.

final discharge *before* the end of their maximum term have their records cleared and all their civil rights restored." Hearings at 14 (emphasis added). Section 5021(b) is carefully drafted to allow only those youth offenders who were given probationary sentences and who were unconditionally discharged by a court before the completion of their sentences to reap the benefits of having their convictions set aside.[3] Had Congress intended the convictions of all youth offenders to be set aside upon successful completion of their probationary sentences, it could have stated so clearly.

[9-13] The principal purpose of the FYCA is to rehabilitate persons who are unusually vulnerable to the danger of recidivism because of their youth. *Dorszynski v. United States*, 418 U.S. 424, 432, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974); H.R.Rep. at 1, UCCS at 2983; S.Rep. at 1. Thus, rehabilitation is substituted for retribution as a sentencing goal. *Durst v. United States*, *supra*, 434 U.S. at 543, 98 S.Ct. at 851; H.R.Rep. at 1, 8, UCCS at 2982, 2985. To effectuate this goal, the FYCA empowers the trial judge with broad discretion to choose among available sentencing options. *Dorszynski v. United States*, *supra* at 437, 94 S.Ct. at 3049. It allows the trial judge to obtain an extremely comprehensive presentence report. *See Ralston v. Robinson*, — U.S. —, —, 102 S.Ct. 233, 239, 70 L.Ed.2d 345 (1981); 18 U.S.C. § 5010(e); S.Rep. at 2, 10. In this way, sentences can be determined according to the needs of the particular offender, rather than according to the type of crime committed. *Dorszynski v. United States*, *supra* at 434, 94 S.Ct. at 3048. The Act emphasizes flexibility and individual attention. *Durst v. United States*, *supra* 434 U.S. at 545, 98 S.Ct. at 851. *See* Hearings at 63. For this reason, public policy strongly favors sentencing youths under the FYCA whenever possible. To hold that FYCA convictions may not serve as the basis for a recidivist penalty might skew the priorities of a trial court, for when there is a choice between sentencing a defendant as a misdemeanant or under the FYCA, the court may choose the former merely because it could serve as the basis for a later felony conviction, while the FYCA sentence could not. Thus, such a holding could vitiate the policy in favor of sentencing under the FYCA.[4]

[14] Appellant was sentenced under D.C.Code 1981, § 22-3204. It provides for an enhanced penalty when "the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony...." Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not. *Cf. United States v. Wilson*, 404 F.2d 521 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003, 89 S.Ct. 1600, 22 L.Ed.2d 781 (1969). (Second offender status is determined by prior conviction under Narcotics Drugs Import and

3. *Dorszynski v. United States*, 418 U.S. 424, 435, 94 S.Ct. 3042, 3048, 41 L.Ed.2d 855 (1974); *Watts v. Haddon*, *supra*; *United States v. Henderson*, 482 F.Supp. 234, 236 (D.N.J.1979); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973); *United States v. Brunson*, 449 F.2d 302 (10th Cir.), *cert. denied*, 405 U.S. 994, 92 S.Ct. 1268, 31 L.Ed.2d 463 (1971); *e.g.*, *Doe v. Webster*, *supra*; *cf. Tatum v. United States*, *supra*; *Cunningham v. United States*, 461 F.2d 993, 996 (9th Cir. 1972); *Nast v. United States*, 415 F.2d 338, 340 (10th Cir. 1969) (FYCA offenders with non-probationary sentences imposed upon them who are unconditionally discharged before completion of their sentences are entitled to have their convictions set aside).

4. Apart from the testimony of Mr. Dodd, the comments cited herein discuss the 1950 version of the FYCA. Although youths placed on probation were generally charged with lesser offenses, the 1950 version of the Act did not include them. In 1961, § 5021(b) was added. The amendment simply extended the opportunity to have a conviction set aside to youth offenders placed on probation. Because Congress evidenced no intention to alter the basic purpose or functioning of the FYCA in 1961, the comments cited herein are pertinent to § 5021(b). *See* 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd).

— For more information on the legislative history of the FYCA, *see Doe v. Webster*, *supra*.

Export Act or other enumerated statute rather than by actual imposition of sentence under one of them.) This provision evidences the congressional belief that no purpose would be served by giving a repeat offender a lenient sentence because he obviously was not rehabilitated by serving the lenient sentence the first time. This applies even more forcefully to the FYCA since persons sentenced under it are given greater opportunities for rehabilitation than are other offenders.

[15, 16] Unless there are persuasive reasons to the contrary, we must construe a statute according to the ordinary meaning of its words. *See Temporaries Inc. v. District Unemployment Compensation Board*, D.C.App., 394 A.2d 14, 17 (1978). In the instant case, the legislative history contains no persuasive reasons to the contrary, while the case law and public policy support the plain meaning of the statute. Accordingly, we hold that under the FYCA § 5021(b) only those youth offenders who are unconditionally discharged by a court before completing a FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them.

[17, 18] When a conviction has not been set aside, it may be the basis of a recidivist penalty. *Barber v. United States*, 570 F.2d 1219, 1228 (10th Cir. 1978); *See United States v. Brunicky*, 588 F.2d 773 (10th Cir. 1978); *cf. Lewis v. United States*, *supra* 445 U.S. at 61 n.5, 100 S.Ct. at 913 ("... a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated."); *New Bonner Institute, Inc. v. Dickerson*, 649 F.2d 216, 219 (4th Cir. 1981) (a federal firearm disability imposed because of a prior felony conviction is removable by vacation of the prior conviction). In the instant case, appellant completed the full term of his probationary sentence; he was not discharged by a court prior to the expiration of his sentence. Thus, he was not entitled to an automatic set aside of his conviction, and the conviction was a proper basis for the recidivist sentence he received in 1980 for carrying a pistol without a license.

If sentencing a defendant as a felon based on a FYCA conviction is unjust, the remedy must be afforded by Congress, not by this court in the guise of statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorszynski v. United States*, *supra* 418 U.S. at 442, 94 S.Ct. at 3082.

Affirmed.

James W. KEGLEY, Appellant,

v.

DISTRICT OF COLUMBIA, et al., Appellees.

No. 80-122.

District of Columbia Court of Appeals.

Submitted Nov. 4, 1981.

Decided Feb. 16, 1982.

Former police officer appealed from review by the Superior Court, District of Columbia, Paul F. McArdle, Trial Judge, of metropolitan police department police trial board decision dismissing him from police force. The Court of Appeals, Kelly, J., held that: (1) scope of review in Superior Court of decision made by trial board is same as Court of Appeals' scope of review of contested case under District of Columbia Administrative Procedure Act; (2) trial court clearly erred in review of dismissal decision where it did not apply standard of review similar to that embodied in Act but heard additional evidence in case and plainly substituted its judgment for that of trial board; (3) when decision of Superior Court reviewing action of trial board is appealed, Court of Appeals uses scope of review employed in reviewing contested cases; and (4)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN,

Defendant.

Criminal Action No. F-6581-79

Washington, D. C.

Monday, January 5, 1981

The above-entitled action came on for a sentencing before the Honorable JOSEPH M. F. RYAN, JR., Associate Judge, in Courtroom Number 44, commencing at approximately 10:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

R. DENNIS OSTERMAN, Esquire
Assistant United States Attorney

On behalf of the Defendant:

THOMAS FARQUHAR, Esquire
Washington, D. C.

Kathleen L. Peterson
Official Court Reporter

Telephone 727-1769

PROCEEDINGS

THE DEPUTY CLERK: United States versus Melvin E. Tuten, for sentencing.

THE COURT: This was a jury trial?

MR. FARQUHAR: That's correct.

THE COURT: He has an arson trial scheduled for the 26th?

MR. FARQUHAR: That's correct, Your Honor.

MR. OSTERMAN: This is Mr. Tapp's case. I don't know whether he wanted to be here for this or not.

THE COURT: I think he probably did.

I tell you, when I read the presentence report today -- I think I'd like to know what happens -- am I going to try the 26 January case ?20?

MR. FARQUHAR: Yes, Your Honor.

THE COURT: I think I'd like to set sentencing after that, after the trial on that case.

MR. FARQUHAR: All right.

Your Honor, I might state, if you wish, we could carry it along till that trial. Plus, I have been trying to inquire into the validity of the prior conviction in this particular case. It's a CDW felony, based on a prior CDW conviction. My understanding was the earlier conviction was under the youth act. The presentence report says it was not expunged, but it is my understanding under 55-021(c)

///

it is automatic if you go four years. I ordered the files from the record center on December 4th, but they haven't come in yet. So possibly they could come in in that time.

THE COURT: Let's put this toward the end of the month, after the other trials.

THE DEPUTY CLERK: 28th, 29th?

MR. FARQUHAR: 28th I think would be fine.

[Thereupon, the proceedings in the above-entitled action were concluded at approximately 10:32 a.m.]

///

CERTIFICATE OF REPORTER

I, Kathleen L. Peterson, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the sentencing in the case of UNITED STATES OF AMERICA v. MELVIN E. TUTEN, Criminal Action No. F-6581-79, in said Court, on the 5th day of January, 1981.

I further certify that the foregoing three pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 2nd day of May, 1981.

Official Court Reporter.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA :

v. : Criminal Action No. F-6581-79

MELVIN E. TUTEN, :

Defendant :

Washington, D. C.

Monday, January 26, 1981

The above-entitled action came on for Sentencing before the Honorable JOSEPH M. F. RYAN, JUNIOR, Associate Judge, in Courtroom No. 44, commencing at approximately 9:30 o'clock a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

B. M. TAPP, Esquire
Assistant United States Attorney

On behalf of the Defendant:

T. W. FARQUHAR, Esquire
Washington, D. C.

...

Robert Bradley
Official Court Reporter Telephone 727-1767

PROCEEDINGS

DEPUTY CLERK: Your Honor, number 5 on Your Honor's sentencing calendar, United States versus Mr. Melvin E. Tuten, Case No. F-6581-79.

THE COURT: Mr. Tuten, you are here for sentencing after conviction by a jury on the offense of carrying a dangerous weapon. I will give you a chance to speak, or have your attorney speak on your behalf before I pronounce sentencing.

MR. FARQUHAR: Just briefly, just one point that I want to make, possibly two.

One point the Report recommendation to the Court is favorable, much more than I anticipated.

Although I suppose it's somewhat realistic in his point of view of the event.

One point I did want to raise with the Court in this case, I have looked into the matter in some detail and I think it, as far as conviction is concerned, the only sentence would be a misdemeanor and not as a convicted felon. As you know this case is basically one where he had a prior conviction of carrying a dangerous weapon.

I think the offense took place 1970, and the conviction was in February 1971.

At that time he was Youth Act eligible for sentencing under the Youth Correction Act, and as I see the

law frankly, I admit it is not a case one way or the other.

Under the Federal Youth Corrections Act he goes for 4 years without any conviction, and that conviction was espunged, and could not be used for the purpose of recidiviance to enhance the penalty on the second conviction of carrying a dangerous weapon. ..

I think I mentioned once before and to Mr. Tapp, I had looked into the matter and I did order the records from the Records Center, and I just don't know where the records are.

My original order for the records was dated December 1st, and we are working now almost to February 1st, and no records have come in yet.

I would be hopeful I could see the records and see precisely what was done.

Even without the records I would still contend more than likely that I am correct in this matter.

I haven't been able to find a case one way or the other.

There is a case from the United States Court of Appeals called Stevenson, and they say espunged can't be used. It is not one that's thoroughly held, it is kind of a surprise, and if the Court thinks it would affect it along that line, you would have to come up with a particular Youth Act sentence available in this case. If it has come

up with one, I can't find one, and I just wanted to point that out to Your Honor. I do think it would make a big difference.

THE COURT: Mr. Tapp.

MR. TAPP: I would like to point out to the contrary. Mr. Tuten is exposed to a 10 year maximum felony for this particular offense. 5010(a) provides that he may be sentenced as a youth offender and unless on a motion of counsel, and if the Court desires if following a motion the recommendation of counsel, it can certainly espunge it.

But no such motion has been made in this case. And the prior docket in this particular case reflects that Mr. Tuten was convicted in 1971, and in that matter has not been espunged since trial.

It is not a question of getting a request or looking at the Court records. And I personally looked at the Court jacket today and got a copy, a certified copy of the conviction which indicates that Mr. Tuten was convicted in 1971 for carrying a pistol without a license. And the matter has not been espunged since that time.

The argument is moot unless old counsel or new counsel, whoever makes a motion to the prior Judge.

Mr. Tuten did that probation, as a matter of fact, and it wasn't even an espungement with respect to the 5010(a) conviction.

I further point out that the facts of this case indicated that Mr. Tuten was carrying a pistol, and was not only carrying it in violation of the law of the District of Columbia, he was carrying it, I dare say, with the intent to use it according to the evidence that we heard from the witnesses. Specifically the mother testified that when Mr. Tuten walked up to the house and asked for her son he was carrying the pistol in his back. Then he was cruising back and forth in front of the house before the Police finally stopped him and apprehended him with the pistol.

Based on the facts of the circumstances in this case a particular period of incarceration is certainly warranted based on the facts of he was carrying a pistol in this particular case. But on other instances with his record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests. His present record indicates violent act outs or behavior of Mr. Tuten, and I think a period of incarceration is warranted under the circumstances.

THE COURT: Do you care to reply?

MR. FARQUHAR: Just one remark.

The only difference and the dispute that I would make with Mr. Tapp is, as I understand as far as the espungement is concerned that is automatic under the Statute I believe 5021(d). I am not sure of the provision.

As far as the certificate of rehabilitation is concerned, the statute is somewhat unclear. And I have no idea from what I can tell of any lascivious history. It is not really clear if you go over the certificate of rehabilitation and you have to move the Court as far as espungement is concerned, and I believe that is automatic. I think his argument would be in error on that point. That is the only point I wanted to make.

THE COURT: It just does seem to me that the purpose would be defeated for putting anybody under a Youth Act sentence, no matter how he behaved under a Youth Act sentence, it is just not automatically going to get espunged. I don't think that would be the intent.

Well, I go along with Mr. Tapp's argument. It is probably an interesting point for the Court of Appeals.

But I have looked at my notes and I disagree with the presentence report.

I tried the case. I think I got about 4 or 5 pages of notes.

My sentencing will be 2 to 6 years.

And, Mr. Tuten, you do have a right to appeal.

If you can't afford an appeal you can file in the form of a pauper and the Court Clerk will file an appeal for you if you so desire.

CERTIFICATE OF REPORTER

I, Robert Bradley, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had, upon the sentencing in the case of UNITED STATES OF AMERICA v. MELVIN E. TUTEN, Criminal Action No. F-6581-79, in said Court, on the 26th day of January, 1981.

I further certify that the foregoing 6 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this 14th day of May, 1981.

Robert Bradley
Official Court Reporter

District of Columbia
Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED MAR 30 1982
Clerk

No. 81-204

MELVIN E. TUTEN, Appellant,

v. F 6581-79

UNITED STATES, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, and Belson, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition is denied.

PER CURIAM

Copies to:

Honorable Joseph M. F. Ryan, Jr.

Clerk, Superior Court

Linda S. Gillespie, Esquire
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John A. Terry, Esquire
Assistant U. S. Attorney

11

Office - Supreme Court, U.S.
FILED
NOV 8 1982
STEVAS
CLERK

No. 81-6756

In the Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER,

v.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 20, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

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IN THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

MELVIN E. TUTEN

THE FOLLOWING IS A CHRONOLOGICAL LISTING OF ALL COURT PROCEEDINGS

Docket No. F-6581-79

DATE	ENTRIES
11-24-79	Defendant informed of right to counsel. Defendant informed of complaints. Defendant is not required to make statement as any statement made by defendant may be used against him. Continued to 12-3-79 for preliminary hearing. Personal recognizance, third party custody, Blackman's Development Center.
12-3-79	ISABELLE CORMIER, OFFICIAL COURT REPORTER. Preliminary hearing held. The court finds no probable cause. Defendant discharged. Defendant and attorney present.
7-1-80	CAROLYN G. STILLEY, OFFICIAL COURT REPORTER. Defendant and counsel present. Defendant arraigned Counts E & F. Plea not guilty. Continued to 7-16-80 for status hearing. Personal recognizance.
7-16-80	CAROLYN G. STILLEY, OFFICIAL COURT REPORTER. Defendant and counsel present. Continued to 9-29-80 for status hearing. Bond remains.
9-29-80	TERRY L. HENRY, OFFICIAL COURT REPORTER. Defendant and counsel present. Continued to 10-20-80 for status hearing. Personal recognizance to remain.
10-1-80	CASE REASSIGNED TO Judge Ryan.
10-20-80	ISABELLE M. CORMIER, OFFICIAL COURT REPORTER. Attorney ill and requests a continuance. Case continued to 10-22-80 for status hearing. Bond personal recognizance remains.

DATE	ENTRIES
10-22-80	ISABELLE M. CORMIER, OFFICIAL COURT REPORTER. Status hearing held. Continued to 11-12-80 for trial. Bond personal recognizance remains.
11-12-80	L. PAVLISH, OFFICIAL COURT REPORTER. Case continued to 11-3-80 as back-up. Personal recognizance remains.
11-13-80	L. PAVLISH, OFFICIAL COURT REPORTER. Case continued to 11-14-80 for trial. Personal recognizance.
11-14-80	LINDA CAUSERO, OFFICIAL COURT REPORTER. Court in trial and unable to reach. Case continued 11-17-80 for trial. Personal recognizance. Waiting list for jurors five judges ahead.
11-17-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Bond (personal recognizance) revoked. Defendant failed to appear for trial. Bond $5,000 surety if defendant is apprehended case continued to 11-25-80 for trial. Bench Warrant ordered and issued forthwith. Case sent to files pending service.
11-19-80	Bench Warrant issued.
11-24-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Defendant appeared and was taken into custody by U.S.D.M. Case continued to 11-25-80 for trial. Bond $5,000.00 surety.
11-25-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Court in trial. Case continued to 11-26-80 for trial. Bond $5,000.00 surety remains. PD 163 filed.

DATE	ENTRIES
11-26-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Jury sworn for trial. Government rests. Defense Order for Motion for Judgment of Acquittal denied. Defense presents case. Trial resumed and stipulations agreed upon as to doctor's report. Defense rest. Arguments and instructions heard. Jury retire to deliberate. Jury reached a verdict Count "E" not guilty. Jury verdict Count "F" guilty (Carrying Pistol without a License). Case continued to 1-5-81 for report and sentence. Bond $5,000 surety remains.
12-01-80	Bench Warrant executed. WALES Cleared. (see entry of November 24, 1980).
1-05-81	KATHLEEN L. PETERSON, OFFICIAL COURT REPORTER. Case continued for sentencing until after pending trial 1-26-81. Continued 1-28-81. Bond remains, $5,000.00 surety.
1-26-81	ROBERT BRADLEY, OFFICIAL COURT REPORTER. Final disposition Count "F" Two (2) years to six (6) years.
1-27-81	NOTICE OF APPEAL FILED THIS DATE.

DISTRICT OF COLUMBIA COURT OF APPEALS

GENERAL DOCKET

DATE	FILINGS—PROCEEDINGS
4/7/81	Record on Appeal (n) ag
4/20/81	Motion of appellant to extend time to file brief 40 days after filing of transcript (m-20) ag GRT/cog (fvf)
4/29/81	Supplemental record (18 pages—Cormier) sl Reporter Peterson 4pd. 5/4 Stilley 4pd. 5/21
4/30/81	Supplemental record #2 (6 pages—Stilley) sl
5/11/81	Supplemental record #3 (4 pages of transcript—Peterson) (n) ag
6/5/81	Supplemental record #4 (7 pages of transcript—Bradley) ag
6/22/81	Appellant's brief (m-22)—pp
7/17/81	Appellee's brief (m-17)—pp
8/3/81	Appellant's reply brief (p-3) mlh
8/26/81	Supplemental record #5 (162 pages of transcript—Hurt) ag
11/25/81	ARGUED before Judges Newman, Kelly and Nebeker.
2/10/82	OPINION per Associate Judge Catherine B. Kelly (p.239) JUDGMENT affirming judgment of conviction.
2/22/82	Appellant's petition for rehearing en banc (m-22) mlh
3/4/82	MANDATE ISSUED kk
3/30/82	ORDER denying appellant's petition for rehearing en banc (NwKyKnNbMkFePyBe) cmj

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

Criminal No. F6581-79
JUDGE RYAN

UNITED STATES OF AMERICA

v.

MELVIN E. TUTTEN

INFORMATION AS TO PREVIOUS CONVICTION

The United States of America, pursuant to D.C. Code 23-111, hereby informs the Court that the defendant, Melvin E. Tutten is the same person who on February 12, 1971 was previously convicted of Carrying a Pistol without a License in Criminal No. 47324-70 in the Superior Court of the District of Columbia. He is, therefore, subject to the increased punishment provided for by the D.C. Code 22-3204.

CHARLES F.C. RUFF/s/
United States Attorney

/s/ _____
BARRY M. TAPP
Assistant United States Attorney

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
F-6581-79

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN, DEFENDANT.

Washington, D.C.
Monday, January 5, 1981

The above-entitled action came on for a sentencing before the Honorable JOSEPH M. F. RYAN, JR., Associate Judge, in Courtroom Number 44, commencing at approximately 10:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

R. DENNIS OSTERMAN, *Esquire*
Assistant United States Attorney

On behalf of the Defendant:

THOMAS FARQUHAR, *Equire*
Washington, D.C.

KATHLEEN L. PETERSON
Official Court Reporter

TELEPHONE 727-1769

PROCEEDINGS

[2] THE DEPUTY CLERK: United States versus Melvin E. Tuten, for sentencing.

THE COURT: This was a jury trial?

MR. FARQUHAR: That's correct.

THE COURT: He has an arson trial scheduled for the 26th?

MR. FARQUHAR: That's correct, Your Honor.

MR. OSTERMAN: This is Mr. Tapp's case. I don't know whether he wanted to be here for this or not.

THE COURT: I think he probably did.

I tell you, when I read the presentence report today—I think I'd like to know what happens—am I going to try the 26 January case too?

MR. FARQUHAR: Yes, Your Honor.

THE COURT: I think I'd like to set sentencing after that, after the trial on that case.

MR. FARQUHAR: All right.

Your Honor, I might state, if you wish, we could carry it along till that trial. Plus, I have been trying to inquire into the validity of the prior convinction in this particular case. It's a CDW felony, based on a prior CDW conviction. My understanding was the earlier conviction was under the youth act. The presentence report says it was not expunged, but it is my understanding under 55-021(c) [3] it is automatic if you go four years. I ordered the files from the record center on December 4th, but they haven't come in yet. So possibly they could come in in that time.

THE COURT: Let's put this toward the end of the month, after the other trials.

THE DEPUTY CLERK: 28th, 29th?

MR. FARQUHAR: 28th I think would be fine.

[Thereupon, the proceedings in the above-entitled action were concluded at approximately 10:32 a.m.]

[4] **CERTIFICATE OF REPORTER**

(omitted in printing)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
F-6581-79

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN, DEFENDANT

Washington, D.C.
Monday, January 26, 1981

The above-entitled action came on for Sentencing before the Honorable JOSEPH M. F. RYAN, JUNIOR, Associate Judge, in Courtroom No. 44, commencing at approximately 9:30 o'clock a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

B. M. TAPP, *Esquire*
Assistant United States Attorney

On behalf of the Defendant:

T. W. FARQUHAR, *Esquire*
Washington, D.C.

ROBERT BRADLEY
Official Court Reporter Telephone 727-1767

PROCEEDINGS

[2] DEPUTY CLERK: Your Honor, number 5 on Your Honor's sentencing calendar, United States versus Mr. Melvin E. Tuten, Case No. F-6581-79.

THE COURT: Mr. Tuten, you are here for sentencing after conviction by a jury on the offense of carrying a dangerous weapon. I will give you a chance to speak, or have your attorney speak on your behalf before I pronounce sentencing.

MR. FARQUHAR: Just briefly, just one point that I want to make, possibly two.

One point the Report recommendation to the Court is favorable, much more than I anticipated.

Although I suppose it's somewhat realistic in his point of view of the event.

One point I did want to raise with the Court in this case, I have looked into the matter in some detail and I think it, as far as conviction is concerned, the only sentence would be a misdemeanor and not as a convicted felon. As you know this case is basically one where he had a prior conviction of carrying a dangerous weapon.

I think the offense took place 1970, and the conviction was in February 1971.

At that time he was Youth Act eligible for sentencing under the Youth Correction Act, and as I see the [3] law frankly, I admit it is not a case one way or the other.

Under the Federal Youth Corrections Act he goes for 4 years without any conviction, and that conviction was espunged, and could not be used for the purpose of recidiviance to enhance the penalty on the second conviction of carrying a dangerous weapon.

I think I mentioned once before and to Mr. Tapp, I had looked into the matter and I did order the records from the Records Center, and I just don't know where the records are.

My original order for the records was dated December 1st, and we are working now almost to February 1st and no records have come in yet.

I would be hopeful I could see the records and see precisely what was done.

Even without the records I would still contend more than likely that I am correct in this matter.

I haven't been able to find a case one way or the other.

There is a case from the United States Court of Appeals called Stevenson, and they say espunged can't be used. It is not one that's thoroughly held, it is kind of a surprise, and if the Court thinks it would affect it along that line, you would have to come up with a particular Youth Act sentence available in this case. If it has come [4] up with one, I can't find one, and I just wanted to point that out to Your Honor. I do think it would make a big difference.

THE COURT: Mr. Tapp.

MR. TAPP: I would like to point out to the contrary. Mr. Tuten is exposed to a 10 year maximum felony for this particular offense. 5010(a) provides that he may be sentenced as a youth offender and unless on a motion of counsel, and if the Court desires if following a motion the recommendation of counsel, it can certainly espunge it.

But no such motion has been made in this case. And the prior docket in this particular case reflects that Mr. Tuten was convicted in 1971, and in that matter has not been espunged since trial.

It is not a question of getting a request or looking at the Court records. And I personally looked at the Court jacket today and got a copy, a certified copy of the conviction which indicates that Mr. Tuten was convicted in 1971 for carrying a pistol without a license. And the matter has not been espunged since that time.

The argument is moot unless old counsel or new counsel, whoever makes a motion to the prior Judge.

Mr. Tuten did that probation, as a matter of fact, and it wasn't even an espungement with respect to the 5010(a) conviction.

[5] I further point out that the facts of this case indicated that Mr. Tuten was carrying a pistol, and was not only carrying it in violation of the law of the District of Columbia, he was carrying it, I dare say, with the intent to use it according to the evidence that we heard from the witnesses. Specifically the mother testified that when Mr. Tuten walked up to the house and asked for her son he was carry-

ing a pistol in his back. Then he was cruising back and forth in front of the house before the Police finally stopped him and apprehended him with the pistol.

Based on the facts of the circumstances in this case a particular period of incarceration is certainly warranted based on the facts of he was carrying a pistol in this particular case. But on other instances with his record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests. His present record indicates violent act outs or behavior of Mr. Tuten, and I think a period of incarceration is warranted under the circumstances.

THE COURT: Do you care to reply?

MR. FARQUHAR: Just one remark.

The only difference and the dispute that I would make with Mr. Tapp is, as I understand as far as the espungement is concerned that is automatic under the Statute I believe 5021(d). I am not sure of the provision.

[6] As far as the certificate of rehabilitation is concerned, the statute is somewhat unclear. And I have no idea from what I can tell of any lascivious history. It is not really clear if you go over the certificate of rehabilitation and you have to move the Court as far as espungement is concerned, and I believe that is automatic. I think his argument would be in error on that point. That is the only point I wanted to make.

THE COURT: It just does seem to me that the purpose would be defeated for putting anybody under a Youth Act sentence, no matter how he behaved under a Youth Act sentence, it is just not automatically going to get espunged. I don't think that would be the intent.

Well, I go along with Mr. Tapp's argument. It is probably an interesting point for the Court of Appeals.

But I have looked at my notes and I disagree with the presentence report.

I tried the case. I think I got about 4 or 5 pages of notes.

My sentencing will be 2 to 6 years.

And, Mr. Tuten, you do have a right to appeal.

If you can't afford an appeal you can file in the form of a pauper and the Court Clerk will file an appeal for you if you so desire.

[7] **CERTIFICATE OF REPORTER**

(omitted in printing)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Case Number F-6581-79"F"
PDID Number 239-383

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN

JUDGMENT AND COMMITMENT ORDER

WHEREAS the above-named defendant having entered a plea of

☒Not Guilty ☐ Guilty

to the charge(s) of "F" CPWOL

and having been found guilty by

☒ Jury ☐ the Court

and a pre-sentence investigation and report having been

☒ prepared and considered ☐ not requested

IT IS HEREBY ADJUDGED that the defendant has been convicted of and is guilty of the offense(s) charged.

The defendant having been given an opportunity to make a statement in his own behalf, and the government having had the opportunity to reply thereto, it is hereby

ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

"F" Two (2) years to 8 or (6) years

IT IS FURTHER ORDERED that the Clerk or his Deputy deliver a true copy of this order to the United States Marshal and that the copy shall serve as the commitment of the defendant.

Jan. 26, 1981 — JOSEPH M. RYAN, JR.

Date — *Judge*

A TRUE COPY OF THIS ORDER DELIVERED TO THE U.S. MARSHAL OR HIS DEPUTY:

Jan. 26, 1981 — SOPHIA H. BOYETTE

Date — *Deputy Clerk*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Case No. F-6581-79

Jan. 26, 1982

UNITED STATES

v.

MELVIN E. TUTEN

NOTICE OF APPEAL

The appellant hereby appeals to the District of Columbia Court of Appeals for the judgment or order mentioned below.

1. Appellant's Name: Melvin E. Tuten
   Address: 1901 D Street S.W.
   Current Status: ☐ a. Free on: ☐ *Bail*
   ☐ *Personal Recognizance*
   ☐ *Third Party Custody*
   ☒ b. Confined at: D.C. Jail
2. Offense: Carrying a Pistol w/o a License (Felony)
3. Judgment or Order Date: Jan. 26, 1981 Description: Conviction of carrying a dangerous weapon after prior CDW and sentence of not less than two nor more than six years.
4. Issues to be presented by Appellant on appeal: Whether defendant can be convicted of carrying a dangerous weapon (felony) when his prior conviction was under the Federal Youth Correction Act.
5. State the dates and portions of the transcript needed on appeal (*unless specifically requested here, no portion of the transcript will be provided).*

Dates *(If known)*	Portions of Transcript Requested

6. Notice of appeal filed by: ☒ Attorney for Appellant
☐ Defendant *(Pro Se)*

THOMAS W. FARQUHAR
Attorney for Appellant
1320 19th Street N.W.
785-0491
Unified Bar Number: 4077

CD-442/March 76R
Previous editions are obsolete.

DISTRICT OF COLUMBIA COURT OF APPEALS.

No. 81-204

MELVIN E. TUTEN, APPELLANT,

v.

UNITED STATES, APPELLEE.

Argued Nov. 25, 1981.

Decided Feb. 10, 1982.

Defendant was convicted before the Superior Court, District of Columbia, Joseph M. F. Ryan, Jr., Trial Judge, of carrying a pistol without a license, and sentenced to enhanced prison term of two to six years. He appealed. The Court of Appeals, Kelly, Jr., held that: (1) under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and a set aside certificate issued to them, and (2) where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license.

Affirmed.

Linda S. Gillespie, Washington, D.C., appointed by the court, for appellant.

Lisa J. Stark, Asst. U.S. Atty., with whom Charles F. C. Ruff, U.S. Atty., and John A. Terry and Barry M. Tapp, Asst. U.S. Attys, were on the brief, for appellee.

Before NEWMAN, *Chief Judge*, and KELLY and NEBEKER, *Associate Judges*.

KELLY, *Associate Judge:*

Appellant was convicted by a jury of carrying a pistol without a license in violation of D.C. Code 1981, § 22–3204, and, on January 26, 1981, was sentenced to a prison term of two to six years. The issue on appeal is whether a felony recidivist sentence may be imposed on the basis of a prior Federal Youth Corrections Act (FYCA) conviction. 18 U.S.C. § 5005 *et seq.* (1976).

Appellant, on November 16, 1970, had previously been sentenced under the FYCA to two years probation for carrying a pistol without a license. He was discharged unconditionally at the end of the two years. Appellant did not apply for a certificate setting aside his conviction, and no such certificate was issued by the court. Appellant (in this case) was again found guilty of carrying a pistol without a license on November 26, 1980. Pursuant to D.C. Code 1981, § 23–111, the prosecutor informed the trial court of the earlier confiction which made appellant eligible for an enhanced penalty under D.C. Code 1981, § 22-3204. Based on the earlier conviction, appellant was sentenced as a felon rather than as a misdemeanant.

To determine whether a FYCA conviction may be the basis for a felony recidivist sentence, we look first to the language of the statute itself. *Lewis* v. *United States*, 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980); *Davis* v. *United States*, D.C. App., 397 A.2d 951, 956 (1979). The FYCA provides in 18 U.S.C. § 5021(b) that

> Where a youth offender has been placed on provation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside

> the conviction, and the court shall issue to the youth offender a certificate to that effect.

Appellant contends that it was error to base his 1981 sentence on his prior FYCA conviction because that conviction should have been automatically set aside under § 5021(b). He argues that the plain language of the statute, its legislative history, and its purposes mandate an automatic set aside because he successfully completed the probationary sentence imposed upon him under the FYCA. However, the assertion that § 5021(b) mandates automatic set aside ignores the phrase "prior to the expiration of the maximum period of probation heretofore fixed by the court." A statute should not be construed in such a way as to render certain provisions superfluous or insignificant. *United States* v. *Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 519-520, 99 L.Ed. 615 (1955); *Zeigler Coal Co.* v. *Kleppe*, 175 U.S. App. D.C. 371, 379, 536 F.2d 398, 406 (1976). Following appellant's interpretation of the statute would necessitate violating this fundamental rule of statutory construction.

The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is coconditional.

Appellant places primary reliance in his argument on *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 876, 66 L.Ed.2d 812 (1981). The *Arrington* court decided that a FYCA conviction is automatically set aside when the defendant is sentenced to any term less than the maximum available sentence and the defendant is unconditionally discharged, regardless of whether the discharge occurred before completion of the actual sentence imposed. Not only, in our judgment, does *Arrington* rely on unpersuasive authority, but also the House of Representatives Report makes clear that the time span for unconditional release is measured by the maximum sentence actually imposed, not by the maximum possible sentence for that offense. The report states that the youth offender must be discharged "unconditional-

ly on or before the expiration of the maximum term *fixed by the sentencing judge.*"[1] H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4 (1950) (H.R. Rep.), *reprinted in* [1950] U.S. Code Cong. Serv. 3983, 3986 (UCCS) (emphasis added).

Appellant correctly asserts that the legislative history of the FYCA indicates the intent to use the set aside provision of the FYCA to give ex-offenders the opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. *Doe* v. *Webster*, 196 U.S. App. D.C. 319, 329, 332 n.51, 606 F.2d 1226, 1234-35, 1239 n.51 (D.C. Cir. 1979); *Hearings on S. 1114 and S. 2609 Before A Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 70 (1949) (Hearings) (Testimony of Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit), "This law blots out their sentence and lets them go without any stigma on their life. . . ." *Id.* at 19. When a conviction is set aside, a certificate is issued to the youth offender. A particularly valuable benefit for offenders sentenced under the FYCA is the prospect of earning this certificate. *Durst* v. *United States*, 434 U.S. 542, 548, 98 S.Ct. 849, 852, 55 L. Ed. 2d 14 (1978). When the opportunity for earning a set aside certificate

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[1] *Arrington* cites *United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977), *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976), and *Minshew* v. *United States*, 410 F.2d 396 (5th Cir. 1969). *Purgason* is unpersuasive authority because the defendant's FYCA sentence was set aside prior to the expiration of his actual probationary sentence. *Fryer* merely holds that a FYCA conviction which has been set aside cannot constitute a conviction for purposes of 18 U.S.C. App. § 1202(a) [illegal possession of firearm by a convicted felon] or 18 U.S.C. § 922(a)(6) [making false statement when buying a firearm]. *Minshew* provides, "In the event that he is unconditionally discharged before the expiration of his maximum sentence, the conviction will automatically be set aside. 18 U.S.C. § 5201." *Id.* at 397. None of these cases discuss the maximum available sentence in relation to the actual sentence imposed.

United States v. *Villar*, 416 F.Supp. 887, 889 (S.D.N.Y. 1976), is the only case which supports *Arrington's* interpretation of § 5021. It states in dicta, "If he were to be convicted as a Youth Adult Offender, however, his conviction would be automatically set aside upon his discharge from probation. 18 U.S.C. § 5021." *Villar* does not explain or elaborate on this statement.

was extended to youth offenders placed on probation in 1961, it was noted that this provision "provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record." 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd). While a conviction may be officially set aside in the court records, it has no effect on newspapers or other accounts of the conviction. *Doe* v. *Webster*, *supra* at 326, 606 F.2d at 1233. The certificate serves as handy evidence to prove to potential employers and others that the conviction has been eradicated by the good conduct of the offender. However, it is evidence that this opportunity was not intended for all those sentenced under the FYCA. Only those offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside. *See Watts* v. *Hadden*, 651 F.2d 1354, 1378 (10th Cir. 1981); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir. 1973). A court will discharge a youth offender only when it concludes that rehabilitation is complete. *See* H.R. Rep. at 9, UCCS at 3992; S.Rep. No. 1180, 81st Cong., 1st Sess. 2, 11 (1949) (S. Rep.); Hearings at 45 (Testimony of U.S. Circuit Judge John J. Parker).

In discussing the differences between a criminal conviction and one that can be automatically set aside under the FYCA, the court stated in *Tatum* v. *United States*, 114 U.S. App. D.C. 49, 51, 310 F.2d 854, 856 (1962); "[A] person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record. . . . [I]t can, by the choice and conduct of the individual, become a noncriminal episode so far as the public records are concerned."

Most importantly, the conviction must actually be set aside before expiration of the probationary sentence imposed upon the youth offender. Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia stated that "committed youth offenders who earn their final discharge *before* the end of their maximum term have their records cleared and all their civil rights restored." Hearings at 14 (emphasis added). Section 5021(b) is carefully drafted to allow only those youth offenders who

were given probationary sentences and who were unconditionally discharged by a court before the completion of their sentences to reap the benefits of having their convictions set aside.[2] Had Congress intended the convictions of all youth offenders to be set aside upon successful completion of their probationary sentences, it could have stated so clearly.

The principal purpose of the FYCA is to rehabilitate persons who are unusually vulnerable to the danger of recidivism because of their youth. *Dorszynski* v. *United States*, 418 U.S. 424, 433, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974); H.R. Rep. at 1, UCCS at 3983; S. Rep. at 1. Thus, rehabilitation is substituted for retribution as a sentencing goal. *Durst* v. *United States*, *supra*, 434 U.S. at 545, 98 S.Ct. at 851; H.R. Rep. at 1, 3, UCCS at 3983, 3985. To effectuate this goal, the FYCA empowers the trial judge with broad discretion to choose among available sentencing options. *Dorszynski* v. *United States*, *supra* at 437, 94 S.Ct. at 3049. It allows the trial judge to obtain an extremely comprehensive presentence report. *See Ralston* v. *Robinson*, ___ U.S. ___, ___, 102 S.Ct. 233, 239, 70 L.Ed.2d 345 (1981); 18 U.S.C. § 5010(e); S.Rep. at 2, 10. In this way, sentences can be determined according to the needs of the particular offender, rather than according to the type of crime committed. *Dorszynski* v. *United States*, *supra* at 434, 94 S.Ct. at 3048. The Act emphasizes flexibility and individual attention. *Durst* v. *United States*, *supra* 434 U.S. at 545, 98 S.Ct at 851. *See* Hearings at 63. For this reason, public policy strongly favors sentencing youths under the FYCA whenever possible. To hold that FYCA

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[2] *Dorszynski* v. *Unites States*, 418 U.S. 424, 435, 94 S.Ct. 3042, 3048, 41 L.Ed.2d 855 (1974); *Watts* v. *Hadden*, *supra*; *United States* v. *Henderson*, 482 F.Supp. 234, 238 (D.N.J.1979); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir. 1973); *United States* v. *Bronson*, 449 F.2d 302 (10th Cir.), *cert. denied*, 405 U.S. 994, 92 S.Ct. 1268, 31 L.Ed.2d 463 (1971); *e.g.*, *Doe* v. *Webster*, *supra*; *cf. Tatum* v. *United States*, *supra*; *Cunningham* v. *United States*, 461 F.2d 995, 996 (9th Cir. 1972); *Nast* v. *United States*, 415 F.2d 338, 340 (10th Cir. 1969) (FYCA offenders with non-probationary sentences imposed upon them who are unconditionally discharged before completion of their sentences are entitled to have their convictions set aside).

convictions may not serve as the basis for a recidivist penalty might skew the priorities of a trial court, for when there is a choice between sentencing a defendant as a misdemeanant or under the FYCA, the court may choose the former merely because it could serve as the basis for a later felony conviction, while the FYCA sentence could not. Thus, such a holding could vitiate the policy in favor of sentencing under the FYCA.[3]

Appellant was sentenced under D.C. Code 1981, § 22-3204. It provides for an enhanced penalty when "the violation occurs after he has been convicted in the District of Columbia of a violation of this sentence or of a felony. . . ." Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not. *Cf. United States* v. *Wilson*, 404 F.2d 531 (2d Cir. 1968), *cert. denied*, 394 (U.S. 1003, 89 S.Ct. 1600, 22 L.Ed.2d 781 (1969). (Second offender status is determined by prior conviction under Narcotics Drugs Import and Export Act or other enumerated statute rather than by actual imposition of sentence under one of them.) This provision evidences the congressional belief that no purpose would be served by giving a repeat offender a lenient sentence because he obviously was not rehabilitated by serving the lenient sentence the first time. This applies even more forcefully to the FYCA since persons sentenced under it are

[3] Apart from the testimony of Mr. Dodd, the comments cited herein discuss the 1950 version of the FYCA. Although youths placed on probation were generally charged with lesser offenses, the 1950 version of the Act did not include them. In 1961, § 5021(b) was added. The amendment simply extended the opportunity to have a conviction set aside to youth offenders placed on probation. Because Congress evidenced no intention to alter the basic purpose or functioning of the FYCA in 1961, the comments cited herein are pertinent to § 5021(b). *See* 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd).

For more information on the legislative history of the FYCA, *see Doe* v. *Webster*, *supra*.

given greater opportunities for rehabilitation than are other offenders.

Unless there are persuasive reasons to the contrary, we must construe a statute according to the ordinary meaning of the words. *See Temporaries Inc.* v. *District Unemployment Compensation Board*, D.C. App., 304 A.2d 14, 17 (1973). In the instant case, the legislative history contains no persuasive reasons to the contrary, while the case law and public policy support the plain meaning of the statute. Accordingly, we hold that under the FYCA § 5021(b) only those youth offenders who are unconditionally discharged by a court before completing a FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them.

When a conviction has not been set aside, it may be the basis of a recidivist penalty. *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978); *See United States* v. *Brzoticky*, 588 F.2d 773 (10th Cir. 1978); *cf. Lewis* v. *United States*, *supra* 445 U.S. at 61 n.5, 100 S.Ct. at 918 ("... a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated."); *New Banner Institute, Inc.* v. *Dickerson*, 649 F.2d 216, 219 (4th Cir. 1981) (a federal firearm disability imposed because of a prior felony conviction is removable by vacation of the prior conviction). In the instant case, appellant completed the full term of his probationary sentence; he was not discharged by a court prior to the expiration of his sentence. Thus, he was not entitled to an automatic set aside of his conviction, and the conviction was a proper basis for the recidivist sentence he received in 1980 for carrying a pistol without a license.

If sentencing a defendant as a felon based on a FYCA conviction is unjust, the remedy must be afforded by Congress, not this court in the guise of statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorszynski* v. *United States*, *supra* 418 U.S. at 442, 94 S.Ct. at 3052.

Affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-204

F 6581-79

MELVIN E. TUTEN, APPELLANT,

v.

UNITED STATES, APPELLEE.

BEFORE: NEWMAN, *Chief Judge*; KELLY, KERN, NEBEKER, MACK, FERREN, PRYOR, and BELSON, *Associate Judges*.

ORDER—March 30, 1982

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition is denied.

PER CURIAM

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Supreme Court of the United States

No. 81-6756

MELVIN E. TUTEN, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the District of Columbia Court of Appeals.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 12, 1982

Cert wtv

No. 81-6756

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-6756

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a prior conviction for which he was sentenced under the Federal Youth Corrections Act (FYCA), 18 U.S.C. 5005 et seq., cannot serve as the basis for a subsequent felony recidivist sentence.

1. In 1970, petitioner was convicted in the District of Columbia Court of General Sessions of carrying a pistol without a license, in violation of D.C. Code §22-3204. He was sentenced under the FYCA (18 U.S.C. 5010(a)) to two years' probation. Petitioner was unconditionally discharged at the end of the two years. He did not apply for a certificate setting aside his conviction, and no such certificate was issued. Pet. 4.

Following a jury trial in the Superior Court of the District of Columbia in the present case, petitioner was again convicted of carrying a pistol without a license in violation of

D.C. law.[1] Prior to sentencing and pursuant to D.C. Code §23-111, the prosecutor informed the trial court of the previous conviction, which subjected petitioner to an enhanced penalty under D.C. Code §22-3204. Based on the earlier conviction, petitioner was sentenced as a felon rather than as a misdemeanant. He received a sentence of two to six years' imprisonment. The District of Columbia Court of Appeals affirmed (Pet. App. 1a-6a).

2. Relying on United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981), petitioner claims that his unconditional discharge from probation automatically set aside his FYCA conviction, so that that conviction could not subsequently be used as the basis for a recidivist penalty. In Arrington, the Fifth Circuit had held that a conviction under the FYCA is automatically set aside whenever the defendant is sentenced to a prison term shorter than the maximum possible sentence and is therefore unconditionally discharged. Thus, the court held, Arrington's previous FYCA felony convictions could not serve as a basis for convictions for violating 18 U.S.C. App. 1202(a)(1), which prohibits the possession of firearms by a convicted felon.[2] Here, however, the District of Columbia Court of Appeals found that the plain language of the FYCA limits the availability of the set-aside provision to those youth offenders whom the sentencing court, in its discretion, chooses to discharge before the expiration of the sentence originally imposed on them. Pet.

1/ The jury acquitted petitioner on a charge of assault with a dangerous weapon.

2/ The Fifth Circuit upheld Arrington's convictions on two other firearms counts, which did not require a prior conviction as a predicate (618 F.2d at 1127). Because only Arrington sought this Court's review of the Fifth Circuit's decision, the question presented by this case was not raised in the petition for a writ of certiorari in Arrington.

App. 3a. Accordingly, the court below held, the mere fact of petitioner's having been unconditionally discharged upon the completion of his probation sentence does not prevent the use of the prior conviction as a basis for imposition of a subsequent recidivist penalty.

Noting that a direct conflict thus exists on the interpretation of 18 U.S.C. 5021,3/ petitioner asserts that this case merits review by this Court. In fact, however, the interpretation adopted by the court below is the only one consistent with the plain language of the statute, its legislative history, and the weight of the judicial precedent. With all due respect, we suggest that the Arrington decision is so clearly aberrational that the conflict it creates does not require resolution by this Court.

Section 5021(b), which specifically concerns probationary FYCA sentences, provides (emphasis supplied):

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Analogously, Section 5021(a), which applies to terms of incarceration, requires the automatic set-aside of the conviction of a youth offender who is unconditionally discharged "before the expiration of the maximum sentence imposed on him." It is thus apparent from the wording of the statute itself that a conviction will be set aside only when a court (or the Parole

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3/ The parallel wording of the two subsections leaves no basis for distinguishing between the two cases on the ground that the Arrington court was construing 18 U.S.C. 5021(a), which deals with sentences of imprisonment, whereas the present case involves 5021(b), which involves probationary sentences.

Commission) has discharged the youth offender prior to expiration of his sentence (whether of incarceration or probation).4/

The legislative history of the statute bolsters the construction placed on it by the court below. At the hearings on the FYCA before the Senate Committee on the Judiciary, Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, a member of the Judicial Conference committee that originally recommended the passage of the Act (Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary, 81st Cong., 1st Sess. 8 (1949)) commented on the set-aside provision (id. at 14; emphasis added):

> Committed youth offenders who earn their final discharge before the end of their maximum term have their records cleared and their civil rights restored.

He later reiterated (id. at 19; emphasis added) that "when the [Youth Correction] Division turns them out ahead of their maximum sentence, this law blots out their sentence and lets them go without any stigma on their life."

Furthermore, the House Report on the FYCA quotes the following language from a letter from the Deputy Attorney General (H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950)):

> If [the youthful offender] has responded to treatment and the Youth Division is of the opinion that his rehabilitation has been accomplished, the youth offender may be discharged unconditionally before the full maximum term has expired, in which event the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect.

As Judge Laws' remarks and the House Report thus make clear, the set-aside provision is not intended to be an automatic protection provided to all youth offenders following completion

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4/ Even petitioner recognizes (Pet. 7) that "the language of Section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them * * *."

of their sentences, regardless of their progress while committed or on probation. Rather, it allows only those offenders who display such exemplary behavior during their commitment or probation that early termination of their sentences is warranted to have their convictions erased from the record.

Finally, the clear weight of authority in the federal courts calls for giving the statutory language effect as written. In Doszynski v. United States, 418 U.S. 424 (1974), this Court held, inter alia, that a trial court is required, prior to sentencing a youth offender as an adult under 18 U.S.C. 5010(d), to make an express finding on the record that the defendant would not benefit from treatment under the FYCA. In reversing and remanding for further proceedings, this Court noted that if the defendant already had served all of his sentence, including probation, he could take advantage of the set-aside provision of the Act only if he were resentenced and if he obtained an early release, as required by 18 U.S.C. 5021 (418 U.S. at 430 n.6; citations omitted; emphasis added):

> To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under § 5010(b) or (c), or placed on probation under § 5010(a), and achieve the early discharge required by § 5021(a) or (b). While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back on probation. The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U.S.C. § 5021(b).

The courts of appeals likewise have generally recognized that a set-aside may be obtained only where a youth offender has been released from probation or incarceration ahead of schedule. Watts v. Hadden, 651 F.2d 1354, 1379 (10th Cir. 1981); Doe v. Webster, 606 F.2d 1226, 1234-1236 (D.C. Cir. 1979); Cox v. United States, 473 F.2d 334, 336 (4th Cir.), cert. denied, 414 U.S. 869 (1973); Cunningham v. United States, 461 F.2d 995, 996 (9th Cir. 1972); United States v. Bronsen, 449

F.2d 302, 305 (10th Cir.), cert. denied, 405 U.S. 949 (1971); Nast v. United States, 415 F.2d 338, 340 (10th Cir. 1969); Tatum v. United States, 310 F.2d 854, 855-856 (D.C. Cir. 1962).

In holding to the contrary, the Arrington court focused (618 F.2d at 1123) on 18 U.S.C. 5017(c), which makes an unconditional discharge from a sentence of imprisonment imposed under Section 5010(b) mandatory after six years. From this the Fifth Circuit presumably concluded that, because the maximum possible adult sentence that could have been imposed on Arrington exceeded six years, an unconditional discharge after six years must mean an early expiration of his sentence and, hence, automatic expunction of the conviction. 618 F.2d at 1123-1124. But the operative language of Section 5021(a) (emphasis added) -- "before the expiration of the maximum sentence imposed upon him" -- can only refer to the actual sentence originally imposed by the court, not to the maximum possible sentence. A similar phrase in Section 5021(b), "prior to the expiration of the maximum period of probation theretofore fixed by the court" (emphasis added), likewise indicates unequivocally that an early discharge is a prerequisite to a set-aside of the conviction. Merely serving the entire term of imprisonment or probation imposed by the sentencing court, regardless of whether it amounts to the maximum sentence that could have been imposed, does not suffice.5/

In sum, the statutory language, the legislative history, and the applicable case law all support the conclusion that a

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5/ Petitioner also cites (Pet. 8) two district court decisions in support of his proposed construction of 18 U.S.C. 5021, United States v. Villar, 416 F. Supp. 887 (S.D.N.Y. 1976), and United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980). In each case, however, the comments were clearly dicta; no extended discussion or citation of authority accompanied the courts' brief remarks. See 484 F. Supp. at 598; 416 F. Supp. at 887. Moreover, in Sinkfield, the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35 and may well have thought that that action satisfied the early release requirement of Section 5021.

conviction is not automatically expunged when an offender is discharged upon completion of his entire sentence of probation, but does not obtain an early discharge. It was therefore proper in this case for petitioner's first conviction, which was never set aside, to serve as the basis for a recidivist sentence. Because the Arrington case, with its contrary conclusion, is plainly an aberration, further review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

Office - Supreme Court, U.S.
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No. 81-6756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an offense for which a youth serves a term of probation pursuant to section 5010(a) of the Federal Youth Corrections Act may be used years later, long after the youth is unconditionally discharged from the Youth Corrections Act program, as the basis for imposing a recidivist felony penalty.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 440 A.2d 1008, and appears at J.A. 19-26.[1] The *per curiam* Order of that court, denying Tuten's petition for rehearing *en banc*, is not reported. That Order is set out at J.A. 27.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on February 10, 1982. A petition for rehearing *en banc* was denied on March 30, 1982. A petition for certiorari was filed on May 20, 1982 and certiorari was granted on October 12, 1982.

The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

STATUTES INVOLVED

A. The Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq.* (1976). Pertinent provisions are:

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of

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[1] References to petitioner's Appendix filed herewith shall be made as App. ____. References to the Joint Appendix shall be made as J.A. ____.

imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

* * *

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offerder has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

B. 22 D.C. Code § 3204. Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

* * *

§ 22 D.C. Code § 3215.

Any violation of any provision of this Chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000, or imprisonment for not more than a year, or both.

C. 23 D.C. Code § 111. Proceedings to establish previous convictions.

(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding

previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

* * *

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose upon him as provided by law.

* * *

STATEMENT

1. The Federal Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.*, was enacted in 1950 in order "to rehabilitate persons who, because of their youth, are especially vulnerable to the danger of recidivism . . ." *Ralston* v. *Robinson*, 454 U.S. 201, 206, citing *Dorszynski* v. *United States*, 418 U.S. 424, 433. "The core concept of the YCA, like that of England's Borstal System upon which it is modeled, is that rehabilitative treatment should be substituted for retribution as a sentencing goal," *Durst* v. *United States*, 434 U.S. 542, 544; S. Rep. No. 1180, 81st Cong., 1st Sess. 4 (1949); H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4-7 (1950).

To achieve this objective, the Act provided sentencing judges with a broad range of new sentencing options designed to provide treatment rather than punishment.

Indeed, the Federal Youth Corrections Act is "the most comprehensive federal statute concerned with sentencing." *Dorszynski* v. *United States*, 418 U.S. 424, 432; *United States* v. *Hopkins*, 531 F.2d 576, 581 (D.C. Cir. 1976) (acknowledging "distinctive character" of youth offender sentencing).

Under the Act, a person below the age of twenty-two (a youthful offender) or between the ages of twenty-two and twenty-six (young adult offender) may be committed to the custody of the Attorney General for "treatment and supervision"[2] for a period of up to six years (18 U.S.C. § 5010 (b)). Commitment under the Act may be for longer than six years, up to the maximum adult offender sentence for the offense charged, if the court "find[s] that [he] may not be able to derive maximum benefit from treatment" within six years (18 U.S.C. § 5010(c)). If it is determined that the offender would not benefit from treatment, he may be sentenced as an adult offender, 18 U.S.C. § 5010(d). Finally, if, in the opinion of the court, a youth offender does not need commitment, the court may suspend the imposition or execution of sentence and place the youthful offender on probation (18 U.S.C. § 5010(a)). The FYCA has been interpreted to give the judge discretion to place the offender on either regular adult probation (18 U.S.C. § 3651 *et seq.)* or Youth Corrections Act probation. *United States* v. *Kurzyna*, 485 F.2d 517 (2d Cir. 1973), *cert. denied*, 415 U.S. 949.[3]

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[2] "Treatment" is defined in section 5006(f) of the Act as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders."

[3] Youth Corrections Act probation is presumably subject to the five-year maximum provided by 18 U.S.C. § 3651. However, if sentence is imposed by a United States Magistrate, Youth Corrections Act probation is apparently limited to six months for conviction of a

The release of youth offenders *committed* under section 5010 is governed by 18 U.S.C. § 5017. The Director of the Bureau of Prisons and the Parole Commission "may at any time . . . release conditionally under supervision a committed youth offender . . ." 18 U.S.C. § 5017(a). An offender must be conditionally released from custody no later than two years before the expiration of his sentence. Unconditional discharge must occur no later than the expiration of the maximum sentence imposed. No such discharge guidelines are specified for youthful offenders placed on probation.

If a committed youthful offender is discharged unconditionally before such a discharge would have been required under the statute, the conviction upon which the sentence rested is automatically set aside and a certificate is issued to that effect. 18 U.S.C. § 5021(a). Initially, this "powerful tool" *(Dorszynski* v. *United States*, 418 U.S. at 435) applied explicitly only to committed youth offenders.

In 1961, however, section 5021(b) was added[4] "to extend the benefit of a certificate to youths sentenced to probation under section 5010(a) when the court unconditionally discharges the youth prior to expiration of the sentence of probation imposed." *Durst* v. *United States*, 434 U.S. 542, 548. Senator Thomas Dodd, the sponsor of the 1961 amendment, noted that, without the amendment, a youth offender who received an early re-

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petty offense and one year for conviction of a misdemeanor. See 18 U.S.C. § 3401 (g)(3), as amended by the Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 7; 93 Stat. 643.

[4] Act of October 3, 1961, Publ. L. No. 87-336; 75 Stat. 750 (codified at 18 U.S.C. § 5021(b) (1976 ed.)).

lease from probation had his conviction "remain on the record *until the original sentence expires.*" 87 Cong. Rec. 8209 (1961) (emphasis added).

2. On February 12, 1971, Melvin E. Tuten, petitioner, entered a plea of guilty in the District of Columbia Court of General Sessions to the charge of carrying a pistol without a license in violation of 22 D.C. Code § 3204.[5] The imposition of sentence was suspended and Tuten was placed on probation for two years under section 5010(a) of the Federal Youth Corrections Act. At the end of that two year probationary period, Tuten was discharged unconditionally from the FYCA program.

Tuten did not apply for a certificate setting aside his FYCA conviction, as is provided by section 5021(b) of the Federal Youth Corrections Act, and no such certificate was issued by the sentencing judge. Although procedures adopted by the District of Columbia Department of Probation with respect to youthful offenders sentenced under section 5010(a) of the Federal Youth Corrections Act required that a memorandum concerning the youth's progress be submitted to the sentencing judge at least thirty days prior to the expiration of the youth's term of probation, no such memorandum was submitted regarding Mr. Tuten. (Affidavit of James E. Porter (App. 2)).[6]

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[5] Appended hereto is a certified copy of the disposition of Criminal Case number 47324-70, rendered on February 12, 1971. (App. 1.) In the Petition for Certiorari, the date November 16, 1970 was stated to be the date when sentence was imposed. This was in error. It was the date on which petitioner was arrested for the earlier offense.

[6] Despite earlier efforts to ascertain the circumstances surrounding the termination of petitioner's probation in 1973, the information related by Mr. Porter only recently became known to petitioner. That is why it is presented to the Court now, in this form. Counsel for

Consequently, petitioner's term of probation was allowed to expire without judicial attention to the question of whether or not he deserved early discharge from probation and the set aside of his offense as provided by the Federal Youth Corrections Act.

On November 24, 1979, more than six years after petitioner's unconditional discharge from probation, he was arrested and charged with carrying a pistol without a license. At a preliminary hearing held on December 3, 1979, however, the court found no probable cause and Tuten was discharged.

Seven months later, on June 19, 1980, a two-count indictment was filed charging Tuten with assault with a dangerous weapon (a stick) and carrying a pistol without a license after having previously been convicted of carrying an unlicensed weapon. Both offenses were allegedly committed on November 23, 1979.

Prior to trial, the Government informed the court below, pursuant to 23 D.C. Code section 111, that Tuten had previously been convicted of carrying a pistol without a license and was therefore subject to the increased, recidivist penalty provided by 22 D.C. Code § 3204 (J.A. 5). The previous conviction relied upon by the Government was the 1970 offense for which Tuten had been sentenced under the Federal Youth Corrections Act (J.A. 5, App. 1).

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the Government was notified and provided with a copy of Mr. Porter's affidavit one day after it was executed.

The failure of the Government officers to submit the matter to the court, and the consequent failure of the court to exercise its discretion, as provided by law, is itself sufficient reason for reversing the decision below.

Petitioner's trial began on November 26, 1980. The following day, the jury found him not guilty of assault with a dangerous weapon, but guilty of carrying a pistol without a license.

Sentencing was originally scheduled for January 5, 1981. Following a brief meeting on that date, however, sentencing was postponed to allow for the completion of another separate and subsequent criminal proceeding in which Tuten was the defendant before the same judge. At the abbreviated January 5 hearing, trial counsel raised the issue of whether Tuten could properly be charged as a recidivist based on his prior FYCA conviction (J.A. 6-7).

On January 26, 1981, notwithstanding a favorable presentence report, over objection by trial counsel that use of the recidivist penalty was wrong (J.A. 10-12) and after the Government misrepresented Tuten's prior criminal record,[7] Tuten was given a felony sentence of not less than two nor more than six years (J.A. 15). Had he been sentenced as a first-time offender, pursuant to 22 D.C. Code section 3215, the maximum sentence would have been one year imprisonment.

As he imposed the felony sentence, the Hon. Joseph F. Ryan, Jr. remarked that the question of whether a repeat-offender sentence could be imposed on the basis of the prior FYCA offense would be "an interesting question for the Court of Appeals." J.A. 12.

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[7] The prosecuting attorney, without any basis in fact, suggested that Tuten had a long history of criminal activity, stating that Tuten's "record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests." J.A. 11-12.

Petitioner appealed (J.A. 17-18). The District of Columbia Court of Appals acknowledged the unique operation and rehabilitative purpose of the Federal Youth Corrections Act (J.A. 24), but the Court affirmed Tuten's conviction, stating (J.A. 25):

> Since the enhanced penalty depends upon the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not.

The court declined to address the fundamental question of whether sentencing a defendant as a felon based on a prior FYCA conviction is proper (J.A. 26). Under the court's reasoning, the judiciary has no role in remedying any injustice suffered by petitioner, even though the remedy here lies in harmonizing the operation of the Federal Youth Corrections Act and the District of Columbia's repeat weapons offender act, so as to serve the purposes of both.

Following denial of rehearing *en banc* (J.A. 27), a petition for a writ of certiorari to review the decision of the District of Columbia Court of Appeals was filed in this Court. The petition and the motion for leave to file *in forma pauperis* were granted by this Court on October 12, 1982 (J.A. 28).

SUMMARY OF ARGUMENT

Petitioner was given one of the lightest penalties possible under the Federal Youth Corrections Act in 1971, and was unconditionally discharged from the FYCA program two years later, without the benefit of judicial review of his performance while on probation. He encountered no further difficulty with the law for nearly seven years.

Nevertheless, the court of appeals held that he should be treated just like any other prior offender for purposes of applying the recidivist felony penalty contained in section 22-3204 of the D.C. Code.

This conclusion is wrong because it (a) is wholly at odds with the purposes and judicial construction of the FYCA, and in particular with the liberal construction afforded section 5021 by the judiciary; (b) does not serve the purposes of repeat offender statutes like section 22-3204 of the D.C. Code; and (c) is not compelled by the statutory language of either the FYCA or the D.C. Code.

(A) As described previously, the principal purpose of the Federal Youth Corrections Act is to rehabilitate, not punish. *Dorszynski* v. *United States*, 418 U.S. 424, 433. "The Act is meant to be an alternative to punishment. Sentencing under the Act is distinguishable from an ordinary prison sentence." *United States* v. *Hunt*, 661 F.2d 72, 75 (6th Cir. 1981). Thus, the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119, 1123 (1980), *cert. denied, on other issues*, 449 U.S. 1086, determined that "Because of the Youth Corrections Act's unique import, the government's citations are inapposite and its position [that an FYCA conviction could be used as the basis upon which to impose a recidivist penalty] erroneous."

Relying upon the text of section 5021(b), the court below held that because petitioner was not unconditionally discharged prior to the expiration of his two-year probationary term, his conviction was not automatically set aside, and could be used to trigger an enhanced, recidivist penalty. In limiting section 5021(b) so sharply, the court of appeals ignored the unique rehabilitative aims of the FYCA, elevated form, and ignored substance. The court's niggardly construction of section 5021 con-

flicts with the liberal interpretation accorded section 5021 by the vast majority of courts that have considered it.

If the decision is allowed to stand, it will virtually ensure that committed youth offenders receive the benefits of the set-aside provision more often than youths placed on probation, especially those placed on probation for a short period of time. This is because there are no release guidelines for youth offenders placed on probation, as are applicable to committed youth offenders. And, because of the shorter period of supervision involved for youthful offenders places on probation, it will, as a practical matter, be more difficult for youths to convince a sentencing judge to exercise his discretion under section 5021 in their favor.[8] This surely was not what Congress intended to do when it sought to "correct an existing inconsistency"[9] in the Federal Youth Corrections Act by adding section 5021(b) in 1961.

(B) The court below merely assumed that an FYCA conviction not set aside pursuant to section 5021 could be used later as the basis for the recidivist sentence petitioner received in 1981 (J.A. 26). This Court has said, how-

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[8] Indeed, petitioner's case was not brought to the attention of the sentencing judge before the end of his probationary term. (App. 2.) We will never know whether petitioner would have qualified for early release: the opportunity for the sentencing judge to exercise the discretion entrusted to him by section 5021 has long since passed. The point is, if the decision of the court below is allowed to stand, early release from probation and automatic set-aside of the conviction of a youth offender sentenced to a short term of probation will realistically depend more on good luck (and perhaps a good lawyer) than on good behavior.

[9] S. Rep. No. 1048, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code, Cong. & Ad. News 3050.

ever, that "the purpose of a recidivist statute . . . is not to simplify the task of prosecutors, judges or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel* v. *Estelle*, 445 U.S. 263, 284. Comparing these goals against the facts of this case demonstrates that sentencing petitioner as a recidivist does not serve the legitimate purposes of a recidivist statute any more than it serves the purposes of the FYCA.

(C) Nothing in the language of the Federal Youth Corrections Act is specifically directed to the question presented by this case: may an offense for which a youthful offender serves a brief term of probation pursuant to section 5010(a) of the Act be used years later as the necessary predicate for a recidivist penalty. When the Federal Youth Corrections Act was passed in 1950, "expungement statutes were uncommon and not generally understood or accepted."[10] Congress did not anticipate that the FYCA and recidivist statutes might be construed together in a manner contrary to the purposes of both.

Section 22-3204 of the D.C. Code which penalizes the carrying of concealed weapons was originally enacted in 1932. The drafters of that provision could not have been thinking about the role that FYCA convictions would

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[10] Comment, "Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision," 66 Ky. L. J. 741, 742 (1978) (hereafter "Expungement of Criminal Convictions").

play in the repeat-offender scheme developed in section 22-3204.

When faced with an issue that was not contemplated by the drafters of the statute in question, the function of the judiciary is not merely to shrug and decline any role in resolving the issue, as did the court below. Instead, a court must "carry into execution the will of the legislature" by interpreting the statute in a way consistent with "the objects and policy of the law." *Kokoszka* v. *Belford*, 417 U.S. 642, 650, quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194. A court has the same responsibility when the question presented involves the interrelationship of two or more statutes. "As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608.

The purposes Congress sought to serve in enacting the FYCA and D.C. Section 22-3204 are completely frustrated by the use of a prior FYCA conviction—one for which a youth has served a term of probation and been discharged unconditionally from the FYCA program—to trigger a recidivist penalty.

ARGUMENT

I. THE PRINCIPAL PURPOSE OF THE FEDERAL YOUTH CORRECTIONS ACT IS TO REHABILITATE, NOT TO PUNISH AS IT WAS USED HERE

A. The Legislative History Of Section 5021 Indicates That It Was To Be A Broad Tool, Instrumental In Accomplishing The Rehabilitation Aims Of The Act

1. Section 5021(a)

In 1942, Chief Justice Harlan Stone appointed a special committee of federal judges to conduct a survey of the

crime correction program in the federal courts. That committee's report contained a draft of what was later to become the Federal Youth Corrections Act. Report to the Judicial Conference of the Committee on Punishment for Crime, "Proposed Draft of an Act to Provide a Correctional System for Adult and Youth Offenders" (1942) (hereafter "Committee Report").

That draft provided:

> Upon the unconditional discharge by the Authority of a youth offender before the expiration of six years from the date of his conviction, where an original sentence was not imposed on such youth offender, and upon the unconditional discharge by the Authority of a youth offender upon whom an original sentence was imposed, before the expiration of the original sentence, the conviction shall be automatically set aside and held for naught . . .

1942 Committee Report at 19-20.

In 1946, the Judicial Conference adopted a revised version of this draft which became the basis for S. 1114. The pertinent provision of S. 1114, section 5025, reads as follows:

> Upon the unconditional discharge by the Board of a youth offender before the expiration of six years from the date of his conviction, the conviction shall be automatically set aside and the Board shall issue to the youth offender a certificate to that effect (a certificate which shall have the same legal effect as a pardon)."

"Correctional System for Youth Offenders," Hearings on S. 1114 and S. 2609 Before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess. 4 (1949).

During the 1949 hearings before the Senate Judidiary Committee, the language was stricken, and the present 5021(a) was substituted in S. 2609 by means of a "technical amendment." *Id.* at 71. This and other technical amendments were adopted without debate (96 *Cong. Rec.* 8267, 68 (1950) (Daily ed.)), but there is evidence that the "pardon" language was eliminated on the ground that this had traditionally been (and under the Constitution was) an executive function.[11] Reviewing the legislative history in *Doe* v. *Webster*, 606 F.2d 1226, 1235 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit concluded that another "plausible explanation for the change in wording is that Congress deemed that the 'pardon' clause would not effectively provide the youth offender with the clean slate intended by the drafters."

Two things at least are clear from this review of the genesis of section 5021. First, all the 1949-1950 discussion regarding the scope and operation of section 5021, including the legislative history cited by the court below (J.A. 21-23), is predicated on a "maximum" sentence of either six years or a longer adult sentence. Those were the only sentencing options available for committed offenders. In this context, the meaning of section 5021(a) is that anyone unconditionally discharged prior to expiration of "the full maximum term,"[12] i.e., six years or longer, was entitled to the set aside of the underlying conviction.

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[11] Schaefer, "The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction," Fed. Probation, Sept. 1975 at 32.

[12] H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950).

Congress did not focus at that time on what conviction set-aside benefits, if any, would be available if the maximum sentence imposed were less than six years, or *if no sentence at all were imposed*, as in the case here, where the imposition of sentence was suspended and the offender was placed on probation. *See United States* v. *Glasgow*, 389 F. Supp. 217, 220 n. 6 (D.D.C. 1975).

Thus, the legislative history of section 5021(a) is not determinative on the specific question posed by this case. To the extent that this history indicates that Congress intended to reward youth offenders who made satisfactory adjustment and were unconditionally discharged from the FYCA program in less than six years, or the maximum sentence allowed for the offense, it supports petitioner's contention that his conviction was set aside by his unconditional discharge from the FYCA program after two years.[13]

Second, the objective of section 5021(a) was to free young persons from the "antirehabilitative effects of attempting to live and work with a criminal record."[14] Although this Court has yet to rule directly on what remains of an FYCA conviction that has been set aside pursuant to

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[13] "The statute called for automatically setting aside a conviction upon the unconditional discharge of the youth from the youth corrections division prior to the expiration of the maximum sentence allowed for the offense and for the issuance of a certificate to that effect." Comment, Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision, 66 Ky. L. J. 741, 742 (1978).

[14] Note, "Expungement of Criminal Records Under the Youth Corrections Act," 62 Iowa L. Rev. 547, 563 (1976) (hereafter "Expungement of Criminal Records").

Section 5021,[15] the prevailing view, based upon the legislative history and purposes of the Act, is that a set-aside conviction is without further legal effect. *See, e.g., Doe* v. *Webster*, 606 F.2d at 1238 ("if these purposes of the Act are to be effectuated, the set-aside provision must be accorded a liberal construction which allows the rehabilitated youthful offender a meaningful fresh start by protecting him from those "stigma" consequences of his conviction which impede his reintegration into society"); *Mestre Morera* v. *United States Immigration and Naturalization Service*, 462 F.2d 1030, 1032 (1st Cir. 1973) ("The clear purpose for the automatic setting aside of a youthful offender's conviction if he responds satisfactorily to treatment under the [FYCA] is to relieve him not only of the usual disabilities of a criminal conviction, but also to give him . . . a second chance free of a record tainted by such a conviction"); *United States* v. *Fryer*, 595 F.2d 11 (6th Cir. 1976) (felony conviction set aside by the FYCA cannot constitute the prior felony conviction needed as an essential element in firearms crimes under 18 U.S.C. App. § 1202(a) and 18 U.S.C. § 922(a)(6)). *See also United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977) and *United States* v. *Doe*, 496 F. Supp. 650 (D.R.I. 1980).

The teaching of these cases is that section 5021, and the principle of forgiveness which it embodies, plays a critical role in the successful operation of the FYCA. When a youthful offender has responded to the treatment provided by the FYCA and has earned his unconditional

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[15] In *Dorszynski* v. *United States*, 418 U.S. 424, 429, n.6, the Court noted that 18 U.S.C. § 5021 does provide for relief from "the disabilities accompanying a criminal misdemeanor conviction . . ."

discharge, denying the youth a fresh start eviscerates the Act.

2. Section 5021(b)

What is the situation of those minor offenders who were given terms of probation rather than sentenced to commitment under the FYCA? Eleven years after the Act was passed, section 5021(b) was enacted. Pub. L. No. 87-336, 75 Stat. 750 (1961).

As construed by the court below, section 5021(b) provides for the set aside of FYCA convictions "only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is coconditional (sic)." J.A. 21.

This interpretation is not, however, borne out by the legislative history of section 5021(b). According to S. Rep. No. 1048, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 3050:

> The purpose of this bill is to correct an existing inconsistency in the Federal Youth Correction Act. Presently a youth offender who has been committed or incarcerated *is entitled upon discharge* to have his conviction set aside. . . . The instant bill will now make available to a youth offender who is placed on probation the same benefits that a youth offender receives who has been committed to a correctional institution. [Emphasis supplied.]

No mention of discharge prior to the expiration of the term of probation imposed upon the offender is mentioned.

The sponsor of section 5021(b), Senator Thomas Dodd, stated that without 18 U.S.C. § 5021(b), a youth offender

who received an early release from probation has his conviction "remain on the record *until the original sentence expires.*" 87 *Cong. Rec.* 8709 (1961) (emphasis added). Implicitly, it was Senator Dodd's understanding that even without 18 U.S.C. § 5021(b), an offender sentenced to a term of probation would have his conviction set aside when "the original sentence expires." As the sponsor and floor manager of the bill, Senator Dodd's statements are entitled to weight.[16] *Simpson* v. *United States*, 435 U.S. 6, 13.

Petitioner does not contend that the language of section 5021(b), in isolation, requires the conclusion that his conviction was set aside upon his unconditional discharge from probation. However, as the court in *Arrington* determined, that position is the only one which comports with the legislative purposes underlying the Federal Youth Corrections Act, as reflected in its legislative history. Especially here when the sentencing judge never exercised the discretion entrusted to him by section 5021(b), an excessively mechanical reading of section 5021(b), uninformed by the purpose it was to serve, works a great injustice that this Court should remedy.

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[16] Compare, however, the statement of then Deputy Attorney General, Byron R. White, in a letter to Hon. Emanuel Cuellar, Chairman of the Committee on the Judiciary:

> The bill would add a new subsection to section 5021 to provide that upon the unconditional discharge of a youth offender prior to the maximum expiration period of his probation fixed by the court, his conviction shall be automatically set aside and the court shall issue a certificate to that effect.

Contained in S. Rep. 1048, *reprinted in* [1961] U.S. Code Cong. & Ad. News 3051.

B. Lower Courts Have Agreed That Section 5021 Bars The Use Of Petitioner's FYCA Conviction As The Basis For The Imposition Of A Recidivist Penalty

As this Court has said, "it is fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" *Richards* v. *United States*, 369 U.S. 1, 11 (footnotes omitted).

Following this principle, the United States Court of Appeals for the Fifth Circuit has held that an offender's unconditional discharge after satisfactorily completing an FYCA sentence under section 5010(b) entitles the offender to the benefits of section 5021(a). *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied on other issues*, 449 U.S. 1086.

John Arrington had been convicted of violating 18 U.S.C. § 1202(a)(1)(1976), a federal law similar to D.C. Code § 22-3204, which forbids the possession of firearms by a convicted felon. The prior felony upon which the violation of section 1202 was based was one for which Arrington had been sentenced under section 5010(b) of the FYCA. Arrington received his unconditional discharge from the program after the six year term provided by section 5010(b).

Arrington appealed his conviction on the section 1202 recidivist charge. Relying upon section 5021(a), he argued that since he had received an unconditional discharge following the completion of his FYCA sentence imposed for the prior felony, "he no longer bore the onus of that conviction and consequently could not have been charged [as a previously convicted felon.]" 618 F.2d at

1121. The Fifth Circuit agreed with Arrington, saying: "Not only does the clear statutory language command this result, but so also does the policy underlying the Youth Corrections Act."

Although the Government argued that *Lewis* v. *United States*, 445 U.S. 55, sanctioned the use of the prior FYCA conviction as the basis for a recidivist penalty, the court distinguished *Lewis* on the grounds that prior FYCA convictions are fundamentally different from other prior convictions:

> The Youth Corrections Act, however, actually operates to remove certain youthful offenders from the realm of those persons who have been convicted of a felony. The Act's import is to remove the taint of youthful indiscretions, giving a youthful offender a second chance to live free of the lifelong ignominy of a criminal record. [Citations omitted.] If a youthful offender has been unconditionally discharged, the disabilities of a criminal conviction are completely and automatically removed; indeed, the conviction is set aside as if it had never been.

618 F.2d at 1124 (citations and footnote omitted).

At least so far as the application of a recidivist penalty was concerned, the court held that Arrington's satisfactory completion of the FYCA sentence imposed upon him had erased that prior felony conviction.[17]

United States v. *Villar*, 416 F. Supp. 886 (S.D.N.Y. 1976) and *United States* v. *Sinkfield*, 484 F. Supp. 595

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[17] The Court noted: "We do not need to decide now if 18 U.S.C. § 5021(a) [1976] also serves to expunge even the record of Arrington's previous conviction. For the purposes of this appeal, defining expunction to include at least setting aside his conviction is a satisfactory resolution." 618 F.2d 1124, n. 8 (citations omitted).

(N.D. Ga. 1980), are further authority for the proposition that youth offenders who complete probationary terms imposed under the FYCA are entitled to be free of the taint of a prior conviction. In *Sinkfield*, the court stated that "upon successful completion of his probationary period, defendant Sinkfield will be entitled to a certificate pursuant to 18 U.S.C. § 5021 setting aside his conviction," 484 F. Supp. 598.[18] In *Villar*, the court found that the defendant's conviction "would be automatically set aside upon his discharge from probation." 416 F. Supp. 889.

C. No Court Other Than The Court Below Has Allowed A Youth Sentenced To A Term Of Probation Under The Federal Youth Corrections Act To Be Later Punished As Recidivist Solely On the Basis Of That Prior Youth Conviction

The court below determined that the *Arrington* decision was based on "unpersuasive authority" and was contrary to the legislative history of the Act (J.A. 21-23). Similarly, the Government in its Memorandum in Opposition to the Petition for Certiorari suggests that the *Arrington* decision is "clearly aberrational," and should be disregarded (p. 3). Yet, no pertinent authority to the

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[18] The Government, in its Memorandum in Opposition to the Petition for Certiorari, suggests that because in *Sinkfield* the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35, it "may well have thought that action, itself, satisfied the early release requirement of Section 5021 (p. 6, n. 5). This suggestion, however, is contrary to the Government's contention that 5021(b) must be strictly construed. How one received a probationary sentence under the FYCA is not a concern of section 5021(b). Following the Government's argument, the only pertinent fact is whether the offender was discharged early from the probationary term that he was given.

contrary is offered by either the court below or the Government, other than discussions of the statute and legislative history.[19]

The court below recognized that the policies of rehabilitation embodied by the FYCA strongly favor sentencing youths under the FYCA whenever possible. But the court reasons from this premise not that petitioner's position should be adopted so as to encourage youths to seek out FYCA treatment, secure in the knowledge that if they respond appropriately, they will not be punished again for this misdeed. Instead, the court expresses concern that the adoption of petitioner's position would be likely to result in reducing the use of the FYCA. This is because trial courts might not sentence under the FYCA if they knew that this youthful conviction would not "count" for purposes of a later felony conviction. (J.A. 25.)

This argument is flawed in two respects. First, since it appears that only the District of Columbia is currently "counting" FYCA convictions like petitioner's for purposes of a later recidivist penalty, one would not expect much change nationally in the use of the FYCA were all sentencing judges prevented from using FYCA convictions in this manner. Second, and more importantly, the court's analysis assumes that judges believe that prosecu-

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[19] *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978), like *Lewis* v. *United States*, 445 U.S. 55, involved collateral challenges to the validity of prior felony convictions. In *United States* v. *Brzoticky*, 588 F.2d 773 (10th Cir. 1978), the court held that a prior felony conviction, the record of which was sealed and expunged *after* the defendant had been charged with a recidivist offense, could properly be used. None of these cases involved prior convictions under the Federal Youth Corrections Act.

tors will be seriously hampered in the effective and proper use of recidivist penalties unless FYCA convictions like petitioner's can be used later to trigger recidivist penalties. No such contention has been made by the Government. Given the purpose of the FYCA—to reach out to youthful offenders while they can still be reached—and the basic purpose of recidivist penalties—to punish severely those who by repeated violations of law show themselves to be a threat to society—no such contention is plausible.[20]

This Court, by adopting petitioner's position and barring the later use of FYCA convictions which are followed by the youth's unconditional and timely discharge from the program, would do much to increase the attractiveness of the FYCA for *both* defendants and judges.

II. EVEN IF PETITIONER'S 1971 FEDERAL YOUTH CORRECTIONS ACT CONVICTION WAS NOT SET ASIDE PURSUANT TO SECTION 5021, THAT CONVICTION SHOULD NOT BE USED AS THE BASIS UPON WHICH TO IMPOSE A RECIDIVIST PENALTY

A. The Purpose Of Recidivist Penalties Would Not Be Served

A number of different rationales exist for enhanced penalties for repeat offenders. Deterrence, retribution,

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[20] Unfortunately, because of controversy generated by the FYCA and the failure of the Bureau of Prisons to implement the Act as Congress desired (*United States* v. *Hunt*, 661 F.2d 72, 75 (6th Cir. 1981)), some defendants are strongly opposed to being sentenced under the Act. *See United States* v. *Amidon*, 627 F.2d 1023 (9th Cir. 1980). *See also* "Oversight Hearings on Federal Bureau Policies Regarding Placement of Juveniles and Implementation of the Youth Corrections Act," Before the House Judiciary Committee, 96th Cong., 2d Sess. (1978).

incapacitation, and even rehabilitation are motivating factors for the recidivist penalties that appear in virtually all penal codes.[21] Although any of these purposes may suffice to support a recidivist penalty, there should be at least some reason to believe that one or more of those purposes will be achieved by the imposition of a recidivist penalty in any particular case. Certain objective criteria have been developed by which the propriety of recidivist treatment for a particular offender can be judged.

The ABA Standards on Sentencing Alternatives and Procedures, for example, specify that:

> An enhanced term should only be permitted if the sentencing court finds that such a term is necessary in order to protect the public from a substantial possibility of further serious criminal conduct by the defendant, and, in support of this finding, also finds that:
>
> (i) the offender has previously been convicted of two felonies committed on different occasions, and the present offense is a third felony committed on an occasion different from the first two . . .; and
>
> (ii) less than five years have elapsed between the commission of the present offense and [the last felony or release from the last felony offense] and
>
> (iii) the offender has previously served a term of total confinement in excess of one year.

ABA Standards, 18-4.4 (2d ed. 1980) p. 18-276-277.

The ABA Standards are, of course, not law. They do, however, illuminate the injustice in imposing a recidivist penalty (punishment is multiplied by a factor of ten under

---

[21] *See* ABA Standards on Sentencing Alternatives and Procedures, Commentary (2d ed. 1980) p. 18-278.

D.C. section 22-3204) upon petitioner, whose only prior offense was a misdemeanor in 1970 for which he was given a term of two years probation under a special rehabilitation program. The interest of the District of Columbia in the enforcement of recidivist penalties, as "expressed in all recidivist statutes, [is] in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel* v. *Estelle*, 445 U.S. 263, 276. Melvin Tuten's record does not show him to be the type of person at whom recidivist penalties are aimed.

Petitioner acknowledges that this Court will not interfere with the exercise of sentencing discretion,[22] and no such inquiry is sought. Rather, his intent here is to demonstrate that adopting petitioner's position barring the use of FYCA convictions such as his to trigger recidivist penalties would not be contrary to the legitimate purposes of recidivist statutes nor would it harm the administration of justice in any other way.

B. The Court Should Not Approve The Decision Of The Court Below When There Is No Evidence That Congress Intended This Harsh Result

The court below declined to address the question whether it was proper for a conviction punished under the FYCA, set aside or not, to be used as the basis for the imposition of a recidivist penalty.

> If sentencing defendant as a felon based on an FYCA conviction is unjust, the remedy must be afforded by Congress, not this court in the guise of

---

[22] *See, e.g., Dorszynski* v. *United States*, 418 U.S. at 443.

> statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorsznski* v. *United States*, *supra*, 418 U.S. at 442, 94 S. Ct. at 3052.

J.A. 26.

This analysis ignores the fact that Congress has never addressed the question of what happens when an FYCA conviction is sought to be used to trigger a recidivist penalty. This kind of situation is not uncommon. Indeed, it is a classic instance of the sort of issues which fall to the judiciary. "Inherent limitations on language and congressional vision mean that, without the aid of the courts, the effectiveness and rationality of congressional demands are inevitably eviscerated." Note, "Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court," 95 Harv. L. Rev. 892, 904 (1982) (hereinafter "Intent").

This Court has long held that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222. This "rule of lenity" has been recently reaffirmed, *Simpson* v. *United States*, 435 U.S. 6, 14, and is related to the Court's duty to protect the rights of the individual." *Dalia* v. *United States*, 441 U.S. 238, 263 (Stevens, J., dissenting).

As has been set forth above, punishing petitioner as a recidivist undermines the central purpose of the Federal Youth Corrections Act and does not serve the legitimate purposes of recidivist statutes. Approving this result would be choosing the harshest alternative even though

Congress, to the extent it has spoken at all, suggests a different result.

> Critical review would not require the Court to reconsider the substantive wisdom of congressional choices, nor would it require the Court to disapprove every inequity resulting from a statute's enforcement. A critical judicial role does demand, however, that the Court approve only those harsh results inevitably attendant on specifically chosen policies. Arbitrary harm unnecessarily imposed on individuals cannot be legitimated.

Note, "Intent," *supra*, 95 Harv. L. Rev. at 906.

Petitioner submits that his conviction and punishment as a recidivist felon, based upon a special term of probation served between 1971 and 1973, is "arbitrary harm unnecessarily imposed." Two statutes, written at two different times, for entirely different purposes, were construed together in a damaging way, not clearly intended by Congress. This need not be the result. It should not be allowed to stand.

CONCLUSION

For the reasons set forth above, petitioner asks that his felony sentence be vacated and that his case be remanded

to the court below for resentencing pursuant to 22 U.S.C. § 3215.

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES
DISTRICT OF COLUMBIA
vs.
MELVIN E TUTTEN

47324-70 B
Case No.

B) CDW
(Offense)

(Address)

11-17-70
(Date of Offense)

Permit No., NOI #, CCR # (As Applicable)

N/A
(Officer)

Date of Action	ACTION
2-12-71	PLEA guilty, Judgement guilty to Count "B" J HALLeck SENTENCE "B" FYCA "A" 5010A 2yr PROB J HALLeck

11-5 1982

I hereby certify, under the seal of this Court, that the foregoing is a true copy, from the official court records, of the disposition in the Superior Court of the District of Columbia in the above-entitled matter.

Clerk, Superior Court
of the District of Columbia

By _____
Deputy Clerk

FORM CD-1071/Jan. 81
Previous edition (C-6) obsolete
81—P8171

AFFIDAVIT OF JAMES E. PORTER

District of Columbia) ss:

James E. Porter, being first duly sworn, says:

1. I am Deputy Director of the Adult Probation Branch of the Social Services Division of the District of Columbia Superior Court and have held this position since 1975. During the period 1972 to 1975, I was Assistant Deputy Director of the Branch. Prior to that time, I was Chief of Youth Parole for the District of Columbia Department of Corrections.

2. In the course of my duties with the Adult Probation Branch of the Social Services Division, I have learned the procedures which are to be followed by probation officers in supervising young adults sentenced to probation under section 5010(a) of the Federal Youth Corrections Act (FYCA). Prior to the compilation in 1975 of these and other Adult Probation Branch procedures in a Manual (current pertinent provisions contained in Exhibit A hereto), I am not aware of any written records regarding these FYCA probation procedures. I am knowledgeable as to the procedures that were to be followed by probation officers supervising youths sentenced to probation under section 5010(a) of the FYCA during the term of Melvin Tuten's FYCA probation between 1971 and 1973.

3. According to those procedures, no later than 30 days prior to the end of the term of probation given a youthful offender, the supervising probation officer was to prepare a memorandum to the sentencing judge describing the offender's progress and adjustment to the community. The purpose of this memorandum was twofold: first, to provide an opportunity for the sentencing judge to consider whether or not to exercise his discretion and grant the youthful offender early discharge from probation; and second, to furnish the sentencing judge with the information necessary for the informed exercise of his discretionary judgment.

4. At the request of Melvin Tuten's counsel, I have reviewed the file prepared by Mr. Tuten's probation officers

during the period of his probation between 1971 and 1973. Based upon my review of this file, I have determined that no report was made to the sentencing judge 30 days prior to the end of Mr. Tuten's term of probation. Instead, Mr. Tuten's term of probation lapsed without further judicial attention.

/s/ James E. Porter
JAMES E. PORTER

Subscribed and sworn to before me this 3rd day of November, 1982.

/s/ James Indelsmith
JAMES INDELSMITH
Notary Public

My Commission Expires April 30, 1984

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

76-DO

OFFICE MEMORANDUM

TO: Phillip Collins, Deputy Director, Special Services Branch
James Porter, Deputy Director, Adult Branch

FROM: Alan M. Schuman, Director, Social Services

SUBJECT: Termination of Federal Youth Corrections Act 5010A Cases

DATE: May 27, 1982

As a result of an inquiry made by Lt. Arbuthnot of the Metropolitan Police Department, I named a committee to review and, if necessary, rework the manner in which the Division terminates Federal Youth Corrections Act cases. A finding of the committee was that the procedure for terminating 5010A cases was not uniform between the Adult and Special Services Branches or within either/both Branches. This lack of uniformity included the form used to recommend for or against early termination and vacation of the conviction.

To insure uniformity in procedures and forms used, the committee drafted the attached forms and procedures. They are to be incorporated into your Branch manuals.

Both forms have been forwarded to Howard Schuyler who will coordinate with the Research, Evaluation and Special Projects Division the finalized printed format and form numbers for each.

In the interim, the effective date for using the forms is immediately. This will mean copying the forms until printed ones are available.

There was no change made in the form that is forwarded to the judge for his/her signature that vacates the conviction. Continued use of that form as it is presently constituted is intended.

Should you have any questions, please contact me.

Attachments

cc: Committee Members:
Kevin Fidgeon
Margaret Livingston
Al Yarborough
Nancy Cohen

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
SOCIAL SERVICES DIVISION
WASHINGTON, D. C. 20001

TO: : The Honorable _____

FROM : _____

Subject: Federal Youth Corrections Act - Section 5010A

RE : _____

Docket Number: _____ PDID Number: _____

On _____, the above named defendant received a suspended sentence under 5010A of the Federal Youth Corrections Act and was placed on probation for _____ months. The defendant had been convicted of _____ on _____

At sentencing, certain conditions of probation were stipulated. The following indicates each condition and whether it has been met to date.

Condition(s)	Met	Not Met
1. _____	☐	☐
2. _____	☐	☐
3. _____	☐	☐
4. _____	☐	☐

Regarding rearrests, the defendant has:

☐ remained arrest free.

☐ been rearrested; however, the charge was nolle prosequi; dismissed or no papered.

☐ been rearrested, however, the case is still pending.

☐ been rearrested and convicted of _____ on _____.

Furthermore, the defendant's adjustment to supervision has been

☐ satisfactory ☐ unsatisfactory

Based on the above information, I am recommending that:

☐ the defendant's probation be terminated and the conviction set aside in accordance with the provision of paragraph 5021 of the Federal Youth Corrections Act.

☐ the defendant's probation expire without the benefits described in paragraph 5021 of the Federal Youth Corrections Act.

☐ the defendant's probation be extended

☐ until information on the pending rearrest is received.

☐ due to poor probation adjustment.

_____ _____
Probation Officer Approved by Supervisory Probation Officer

☐ Attached you will find the necessary forms for vacating the defendant's sentence. To insure compliance with the terms of Section 5010A, these forms should be completed prior to the expiration date of the defendant's probation term.

Form [illegible]

SPECIAL PROCEDURES

Youth Corrections Act—Probation
Section 5010A

A. General

Under the Federal Youth Corrections Act (Title 18, Chapter 402, U.S. Code), Section 5010 A, if the Court feels a youth does not need commitment, it may suspend sentence and place him on probation. If a probationer successfully completes his probation period, the Court may set aside his conviction. This provision of the FYCA is intended to give ex-offenders the opportunity to clear their records so that they will not be hampered in economics and other opportunities later in life.

B. Policy

1. Only those offenders who display exemplary behavior during probation are entitled to have their conviction set aside.
2. Any probationer who has been arrested and convicted on a new charge would not be recommended to the Court to receive the benefits of the FYCA.
3. If the defendant is to have his conviction set aside, the Probation Officer must request that there be an early termination of probation.

PROCEDURES

The following guidelines should be utilized when closing any F.Y.C.A.:

1. The FYCA memorandum (Form # ____) must be forwarded to the sentencing judge at least thirty (30) days prior to the expiration of probation.
2. The original Certificate of Vacation and an Order of Discharge and two copies of each are filled out and submitted to the sentencing judge along with the FYCA memorandum for his/her signature.
3. Upon approval of early termination and return of the signed paper, an original of each form is given to the

client, a copy is placed in the Court jacket, the probation file and given to the attorney of record.

4. Notification of the early termination is sent to the FBI and Metropolitan Police Dept. using Form SS(4) 918 so that they can note in their records that the conviction is set aside. An original and two copies are prepared. The original is forwarded to Metropolitan Police Dept. and copies to the FBI and the probation file.

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

No. 81-6756

In the Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

BARBARA E. ETKIND
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KATHLEEN A. FELTON
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QUESTION PRESENTED

Whether a prior conviction for which petitioner was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, and from which he was not unconditionally discharged prior to the expiration of the entire period of probation fixed by the court, can serve as the basis for a subsequent felony recidivist sentence.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-6756

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (J.A. 19-26) is reported at 440 A.2d 1008.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1982, and a petition for rehearing was denied on March 30, 1982 (J.A. 27). The petition for a writ of certiorari was filed on May 20, 1982, and was granted on October 12, 1982 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

STATUTE INVOLVED

18 U.S.C. 5021(b) provides:

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set

aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

STATEMENT

1. The Federal Youth Corrections Act of 1950, 18 U.S.C. 5005 *et seq.* (the "YCA" or the "Act"), was designed as a comprehensive sentencing scheme "to provide a better method for treating young offenders convicted in federal courts * * *, to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. 424, 433 (1974). The Act makes available to federal district courts four options in sentencing youth offenders—that is, persons under the age of 22 years at the time of conviction (18 U.S.C. 5006(d)).[1] First, if the court is of the opinion that a youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the offender on probation. 18 U.S.C. 5010(a). The Act also offers two treatment alternatives.[2] Under 18 U.S.C. 5010(b) and 5017(c), the judge may sentence the defendant to the custody of the Attorney General for treatment and supervision of indeterminate duration up to six years, the defendant being entitled to conditional

---

[1] "Young adult" offenders, who have attained their 22nd birthday but have not yet reached their 26th birthday at the time of conviction, also may be sentenced under the YCA if "the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the [Act]" (18 U.S.C. 4216). The Act ordinarily is not applied to convicted persons under the age of 18, since they are eligible for sentencing under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.* As noted below (note 25, *infra*), notwithstanding their qualifying age, certain multiple offenders in the District of Columbia also are ineligible for sentencing under the Act. See D.C. Code § 22-3202(d)(1).

[2] The Act defines "treatment" as "corrective and preventive guidance and training designed to protect the public by correcting antisocial tendencies of youth offenders." 18 U.S.C. 5006(f).

release under supervision after no more than four years and to unconditional discharge at the end of six years. Alternatively, under Sections 5010(c) and 5017(d), a judge who is of the view that the defendant "may not be able to derive maximum benefit from treatment" within six years after conviction may sentence the defendant to treatment for any longer period authorized by law for the offense in question. The defendant then is entitled to conditional release two years prior to the expiration of the term imposed and to unconditional discharge at the end of that term. Under either treatment alternative, the Parole Commission may conditionally release a defendant "at any time" (18 U.S.C. 5017(a)), and may unconditionally discharge the defendant one year after conditional release (18 U.S.C. 5017(b)). Finally, if the court finds that a youth offender will not derive benefit from treatment under the Act, it may sentence him "under any other applicable penalty provision" (18 U.S.C. 5010(d)).[3]

Another key feature of the Act, which this Court has described as "[a] powerful tool" (*Dorszynski* v. *United States*, *supra*, 418 U.S. at 435), is the automatic set-aside provision. Section 5021(a) provides:

> Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

In 1961, Section 5021(b), the provision directly at issue in this case, was added in order to extend the benefit of the set-aside feature to youth offenders sentenced to

---

[3] A judge who sentences a youthful offender under 18 U.S.C. 5010(d) must make an explicit finding on the record that the offender would not benefit from treatment under the Act. See *Dorszynski* v. *United States*, *supra*.

probation under Section 5010(a). Pub. L. No. 87-336, 75 Stat. 750. Section 5021(b) provides:

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

2. On February 12, 1971, petitioner was convicted on his plea of guilty to the charge of carrying a pistol without a license, in violation of D.C. Code § 22-3204. Petitioner, who was then 19 years old, was sentenced under the YCA to two years' probation. See 18 U.S.C. 5010(a). Petitioner was unconditionally discharged at the end of the two years. He received no certificate setting aside his conviction under Section 5021. Pet. Br. 7, 1a; J.A. 20.

The present case arises out of petitioner's subsequent violation of the same D.C. Code provision on November 23, 1979. Following a jury trial in the Superior Court of the District of Columbia, petitioner was again convicted of carrying a pistol without a license.[4] Pursuant to D.C. Code § 23-111, the prosecutor informed the trial court of petitioner's previous conviction, which subjected petitioner to the enhanced penalty provided by D.C. Code § 22-3204.[5] Based on the earlier conviction, petitioner

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[4] The jury acquitted petitioner on a charge of assault with a dangerous weapon. J.A. 3.

[5] D.C. Code § 22-3204 provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section

was sentenced as a felon rather than as a misdemeanant. He received a sentence of from two to six years' imprisonment. J.A. 3, 5, 15, 20.

Petitioner appealed to the District of Columbia Court of Appeals, claiming that his mere completion of, and unconditional discharge from, the two-year probationary sentence entitled him to an automatic set-aside of the YCA conviction, which therefore could not provide the basis for a subsequent recidivist penalty. The court of appeals rejected this contention, concluding instead that the plain language of Section 5021(b) limits the benefits of the automatic set-aside provision to those youth offenders whom a court, in its discretion, chooses to discharge *prior to* expiration of the sentence originally imposed upon them (J.A. 21).[6] The court found additional support for its reading of the statute in the legislative history (J.A. 21-25), and characterized *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981), on which petitioner relied, as based "on unpersuasive authority" (J.A. 21). The court accordingly held (J.A. 26) that petitioner was not entitled to a set-aside of his YCA conviction, and that therefore that conviction provided a proper basis for the subsequent recidivist penalty.

22-3215 [by a fine of not more than $1,000, or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

[6] The court held (J.A. 21): "The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is [un]conditional."

SUMMARY OF ARGUMENT

A

The plain language, legislative history and consistent administrative construction of Section 5021 all demonstrate the lack of merit to petitioner's claim that he was entitled to a set-aside of his YCA conviction upon his completion of the probationary term imposed on him.

1. The statutory language could not be clearer, and it leaves no room for the construction urged by petitioner. Section 5021(b) unambiguously provides that a youth offender who is placed on probation shall have his YCA conviction automatically set aside if the sentencing court, "in its discretion, unconditionally discharge[s] such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court*" (emphasis added). Petitioner's claim that Section 5021(b) mandates an automatic set-aside of a YCA conviction whenever a youth offender completes the term of probation imposed on him thus runs afoul of the plain language of the statute, which unequivocally restricts the availability of set-aside relief to those YCA probationers who are unconditionally released *before* the expiration of the probationary term imposed on them.

Both this Court and the vast majority of the lower federal courts that have considered the question have recognized that a YCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender before the expiration of his sentence, whether of probation or incarceration. The only court of appeals decision to the contrary is *United States* v. *Arrington*, 618 F.2d 1119 (1980), cert. denied, 449 U.S. 1086 (1981), in which the Fifth Circuit held that every committed youth offender is entitled, upon his eventual unconditional discharge, to a set-aside of his conviction under 18 U.S.C. 5021(a). It is quite evi-

dent from inspection of the opinion in *Arrington* that the court simply misread the statute, overlooking the phrase "before the expiration of the maximum sentence imposed upon him," which language is nowhere discussed or explained in the opinion.

2. We view the plain language of Section 5021 as so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)). In any event, examination of the legislative history strongly reinforces the plain language of the statute.

The set-aside provision that was contained in the YCA as enacted in 1950 made such relief available only to committed youth offenders. Nevertheless, the history of that provision is enlightening, particularly in view of the similarity between its language and that of the subsequently enacted Section 5021(b), and because of Congress' intent in Section 5021(b) to extend to probationers the same set-aside relief that the original Act afforded committed youth offenders.

The clear import of each of the draft provisions of what became Section 5021(a) was that a youth offender would be granted set-aside relief only if he were unconditionally discharged prior to the expiration of whatever sentence had been imposed on him. The Act's authors explained that they intended the set-aside to operate in favor of only those youth offenders who were discharged early, as a reward for their exemplary behavior during treatment. The intent to make the set-aside benefit selective in nature, offered as a reward for good behavior, was reiterated in the legislative history of Section 5021(b) itself. This rehabilitative purpose, however, would be thwarted by the construction of the statute that the *Arrington* court adopted and that petitioner urges.

3. Ever since the enactment of the YCA in 1950, the Board of Parole and the United States Parole Commis-

sion have consistently construed 18 U.S.C. 5021(a) as entitling only those committed youth offenders who are unconditionally discharged prior to the expiration of the sentence imposed on them to set-aside of their convictions. Similarly, since the addition of Section 5021(b) in 1961, the Administrative Office of the United States Courts in its instruction manual for probation officers has interpreted that provision as making set-aside relief available only to those YCA probationers who are unconditionally discharged prior to the expiration of the probationary term imposed on them. This consistent construction of the Act by the agencies charged with its administration is entitled to substantial deference.

B

Petitioner alternatively claims that even if he is not entitled to have his YCA conviction set aside, it nevertheless cannot be used as the basis for a subsequent recidivist penalty because to permit YCA convictions to be used for that purpose would violate the policy underlying both the YCA and recidivist statutes. This contention is baseless.

1. There is nothing in either the language or the legislative history of the YCA that suggests that a conviction thereunder that is not set aside under Section 5021 may not be used as the basis for a subsequent recidivist penalty. Nor is any policy of the Act violated by such use. Once an offender has failed to respond to the special treatment and supervision afforded by the YCA program, as evidenced by his return to crime, no purpose of the YCA would be served by exempting him from harsher penalties simply because he once appeared to be a candidate for successful rehabilitation.

2. Similarly, the sweeping language of D.C. Code § 22-3204's recidivist penalty provision conclusively rebuts the suggestion that it was not intended to be triggered by a YCA conviction. Moreover, the legislative debate on the District of Columbia Law Enforcement

Act of 1953, ch. 159, 67 Stat. 90 *et seq.*, which added the enhanced penalty provision to D.C. Code § 22-3204, focused specifically on the relationship between the proposed legislation and the YCA. The fact that the Congress that enacted the recidivist penalty feature of D.C. Code § 22-3204 was well aware of the existence of the YCA and the implications it could have for sentencing procedures in the District of Columbia, but nevertheless did not exclude YCA convictions from the category of convictions that could trigger the recidivist penalty, confirms the apparent broad sweep of the statutory language. Petitioner thus was correctly sentenced under the enhanced penalty provision of Section 22-3204 on the basis of his prior YCA conviction.

ARGUMENT

ABSENT AN EARLY DISCHARGE FROM THE TERM OF PROBATION IMPOSED ON HIM, PETITIONER WAS NOT ENTITLED TO HAVE HIS YCA CONVICTION SET ASIDE UNDER 18 U.S.C. 5021(b), AND THAT CONVICTION THEREFORE PROVIDED A VALID BASIS FOR PETITIONER'S SUBSEQUENT RECIDIVIST SENTENCE

A. A SET-ASIDE OF A YCA CONVICTION UNDER SECTION 5021 IS AVAILABLE ONLY TO THOSE YOUTH OFFENDERS WHO ARE UNCONDITIONALLY DISCHARGED PRIOR TO THE EXPIRATION OF THE SENTENCE IMPOSED ON THEM

The construction of Section 5021(b) adopted by the court below is compelled by the clear wording of the statute. The interpretation urged by petitioner—that the benefit of Section 5021(b)'s set-aside was intended to inure to anyone who completes his YCA term of probation and is unconditionally discharged at the end of it—can be adopted only by ignoring the plain language of the Act, as well as Congress' clear intent in enacting the statute. Both this Court and the great majority of the lower federal courts have recognized what we sub-

mit is the unambiguous import of the statutory language—that a set-aside of a YCA conviction under Section 5021 is available to only those youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them.

1. The Language Of 18 U.S.C. 5021(a) And (b) Unambiguously Bars Petitioner's Claim

a. As this Court has frequently noted:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

United States v. *Turkette*, 452 U.S. 576, 580 (1981) (citation omitted). See also, e.g., *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

In this case, the pertinent statutory language could not be clearer. Section 5021(b) unambiguously provides that a youth offender who is placed on probation shall have his YCA conviction automatically set aside if the sentencing court, "in its discretion, unconditionally discharge[s] such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court.*" 18 U.S.C. 5021(b) (emphasis added). Analogously, Section 5021(a), which applies to "committed youth offenders,"[7] provides for the automatic set-aside of a YCA conviction only when the defendant is unconditionally discharged "before the expiration of the maximum sentence imposed upon him." The wording of the statute itself thus compels the

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[7] A committed youth offender "is one committed for treatment [under the Act] to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of [the Act]." 18 U.S.C. 5006(e).

conclusion that a YCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender *before* the expiration of his sentence, whether of probation or incarceration.

As the court of appeals observed (J.A. 21), petitioner's claim that Section 5021(b) mandates an automatic set-aside of a YCA conviction whenever a youth offender completes the term of probation imposed on him simply ignores the phrase "prior to the expiration of the maximum period of probation theretofore fixed by the court."[8] The same defect is evident in the opinion of the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119 (1980), cert. denied, 449 U.S. 1086 (1981), the only appellate case supporting petitioner's position. While that opinion asserts (618 F.2d at 1124) that "the clear statutory language command[s]" the result that every YCA conviction be automatically set aside upon completion of the sentence, it nowhere discusses or explains the statutory phrase "prior to the expiration of the maximum sentence imposed." Neither the *Arrington* court nor petitioner has profferred any suggestion, plausible or otherwise, as to what meaning other than the obvious one could be ascribed to that language.

Had Congress intended that the mere completion of a probationary sentence would entitle a youth offender to a set-aside of his conviction, it would have been a simple matter to have so provided. Indeed, Congress included just such a provision in 21 U.S.C. 844(b), which provides that a first offender found guilty of simple possession of a controlled substance may be placed on probation without entry of judgment and that "[i]f during the period of his probation such person does not violate

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[8] Such a construction violates the fundamental rule of statutory construction that effect should be given "to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); see also *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him" (21 U.S.C. 844(b)(1)). Congress' use, in Section 5021(b), of the very different phrase "prior to the expiration of the maximum period of probation theretofore fixed by the court" thus establishes conclusively its intent that the set-aside provision would inure to the benefit only of those youth offenders whom the sentencing court deemed deserving of an *early* unconditional discharge from probation.[9]

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[9] It is undisputed in this case that petitioner served the full two-year term of probation imposed upon him, and that the sentencing court took no action to grant him an early discharge. See Pet. Br. 7. Thus, it is clear that the conditions for a set-aside required by the plain language of the statute were not satisfied here.

Petitioner complains (Br. 7-8 & n.6, 12 n.8), however, that the usual procedures followed by the District of Columbia Superior Court Department of Probation were not complied with in his case. In cases involving youth offenders sentenced to probation under 18 U.S.C. 5010(a), those procedures require the supervising probation officer to prepare a memorandum for the sentencing judge no later than 30 days before the end of the youth offender's term of probation, describing the offender's progress and adjustment in the community. The purpose of the memorandum is to bring to the judge's attention the possibility of granting the offender an early discharge and to provide the judge with the information needed to make an informed decision. Pet. Br. 2a. Petitioner suggests (Br. 8 n.6) that the failure of probation officers to submit his case to the court, and the subsequent failure of the court to exercise its discretion, is itself "sufficient reason for reversing the decision below."

The Act, however, does not prescribe any particular procedures that must be followed in making the early discharge decision. Moreover, the questions whether the Probation Department complied with its own regulations and the effect of any noncompliance are not properly before this Court, since they were neither presented to nor addressed by the court below. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Nor

b. Although this Court has not previously been directly presented with the question raised by this case, it has had the occasion, in related contexts, to note what we submit is the obvious and only possible construction of Section 5021—that its automatic set-aside provisions are available only to youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them. In *Dorszynski* v. *United States*, 418 U.S. 424 (1974), the Court held that, prior to sentencing a youth offender as an adult under 18 U.S.C. 5010(d), a district court is required to make an express finding on the record that the defendant would not benefit from treatment under the YCA. 418 U.S. at 443-444.[10] Because no such finding had been made in that case, the Court in *Dorszynski* reversed and remanded for further proceedings, noting (418 U.S. at 430 n.6; emphasis added) that even if the defendant

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are they fairly included in the question presented in the petition for a writ of certiorari. See Sup. Ct. R. 21.1(a). We note, however, that it is possible that petitioner could move the court that sentenced him under the YCA to exercise its discretion nunc pro tunc to grant him an early unconditional discharge from probation and a set-aside of his conviction. See *United States* v. *Fryer*, 545 F.2d 11, 13 n.3 (6th Cir. 1976). If petitioner were successful in that endeavor he could then seek a reduction of sentence from the second sentencing court under D.C. Super. Ct. Crim. R. 35(a). But see note 23, *infra*. We further note that the procedures adopted by the District of Columbia Department of Probation on which petitioner relies reveal an administrative construction of Section 5021(b) that coincides precisely with the decision below. See also pages 26-30, *infra*.

Finally, to the extent petitioner is arguing (Br. 12 n.8) that an early unconditional discharge should not be a condition precedent to set-aside relief because the possibility of discharging a particular youth offender prior to the expiration of his probationary term may escape the attention of the sentencing court, that argument is properly addressed to Congress, not to this Court.

[10] The Court declined, however, to require the sentencing court to supply reviewable reasons supporting the "no benefit" finding. See 418 U.S. at 441-442.

already had served all of his adult sentence, including probation, he nevertheless could take advantage of the set-aside provision of the Act if he were resentenced thereunder *and if he obtained the early discharge required by 18 U.S.C. 5021:*

> To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under § 5010(b) or (c), or placed on probation under § 5010(a), *and achieve the early discharge required by § 5021(a) or (b).* While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back on probation. * * * The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U.S.C. § 5021(b).

See also 418 U.S. at 435 ("[a] powerful tool available to the [Parole Commission] was its discretion to discharge committed persons unconditionally before it was required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside. 18 U.S.C. § 5021(a). * * * Similarly, if the sentencing judge chose the second alternative created by the Act, *i.e.*, placement of the youth offender on probation under its provisions, the judge himself could exercise his discretion to discharge the offender from probation unconditionally. 18 U.S.C. § 5021(b). * * * This, too, would result in the automatic setting aside of the offender's conviction. 18 U.S.C. § 5021(b)").

The Court also recognized that an early unconditional discharge is a prerequisite for the automatic set-aside relief afforded by Section 5021 in *Durst* v. *United States*, 434 U.S. 542 (1978). There, the Court held that a trial judge who suspends a sentence of commitment and places a youth offender on probation, pursuant to 18 U.S.C. 5010(a), may impose a fine, require restitution, or both as conditions of probation. In so holding, the Court again observed (434 U.S. at 548; emphasis added):

> A particularly valuable benefit for the offender sentenced under the YCA is the prospect of obtaining a certificate setting aside his conviction. A certificate automatically issues when a youth committed to the custody of the Attorney General under § 5010(b) or § 5010(c) is unconditionally released *prior to expiration of the maximum sentence imposed.* 18 U.S.C. § 5021(a) (1976 ed.). In 1961, the YCA was amended to extend the benefit of a certificate to youths sentenced to probation under § 5010(a) when the court unconditionally discharges the youth *prior to expiration of the sentence of probation imposed.* Act of Oct. 3, 1961, Pub. L. No. 87-336, 75 Stat. 750 (codified at 18 U.S.C. § 5021(b) (1976 ed.)).

The majority of the lower federal courts likewise have consistently recognized that a youth offender is entitled to a set-aside of his conviction only when he has been released from probation or incarceration ahead of schedule. *Preston* v. *McCall*, 542 F. Supp. 249, 251 (E.D.N.C.), aff'd, 688 F.2d 834 (4th Cir. 1982) (table); *Watts* v. *Hadden*, 651 F.2d 1354, 1379 (10th Cir. 1981); *Doe* v. *Webster*, 606 F.2d 1226, 1236-1237 (D.C. Cir. 1979); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir.) (en banc), cert. denied, 414 U.S. 869 (1973); *Cunningham* v. *United States*, 461 F.2d 995, 996 (9th Cir. 1972); *United States* v. *Bronson*, 449 F.2d 302, 305 (10th Cir. 1971), cert. denied, 405 U.S. 949 (1972); *Nash* v. *United States*, 415 F.2d 338, 340 (10th Cir. 1969); *Tatum* v. *United States*, 310 F.2d 854, 855-856 (D.C. Cir. 1962).

The only court of appeals decision to the contrary is *United States* v. *Arrington*, *supra*, on which petitioner relies heavily (Br. 11, 20-22).[11] In that case, the court

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[11] Petitioner also relies (Br. 22-23 & n.18) on two district court decisions, *United States* v. *Sinkfield*, 484 F. Supp. 595 (N.D. Ga. 1980), and *United States* v. *Villar*, 416 F. Supp. 887 (S.D.N.Y. 1976). In neither case, however, did any extended discussion or citation of authority accompany the court's brief

held that a youth offender sentenced under Section 5010(b) was entitled to an automatic set-aside of his conviction pursuant to Section 5021(a) upon his unconditional discharge at the end of six years.[12] As noted above (page 11, *supra*), in focusing solely on the unconditional discharge of a youth offender at the completion of his sentence, the Fifth Circuit neither adverted to nor explained the language limiting the setting aside of a YCA conviction to individuals released prior to expiration of their maximum sentence. Since *Arrington* failed to come to grips with the critical statutory language upon which this case turns, it has no persuasive force.

The *Arrington* court also invoked what it considered to be "the policy underlying the Youth Correction Act." 618 F.2d at 1124. But, as we show below, the legislative history bolsters the clear import of the statutory language that Congress intended that only those youth offenders unconditionally discharged prior to the expiration of the sentence, whether of incarceration or of probation, actually imposed on them would be entitled to the set-aside relief provided by 18 U.S.C. 5021.

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dictum. 484 F. Supp. at 598; 416 F. Supp. at 889. Moreover, the remarks in *Sinkfield* on which petitioner relies (Br. 23) may be attributable to the fact that in that case the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35. While we believe the court would have been mistaken, it may well have thought that its action in reducing the defendant's sentence satisfied Section 5021's early discharge requirement.

[12] The Fifth Circuit further held that the set aside conviction could not provide the basis for a conviction for possession of firearms by a convicted felon under 18 U.S.C. App. 1202(a)(1), and accordingly reversed Arrington's conviction on six counts charging violations of that statute. 618 F.2d at 1124-1125. However, the court upheld Arrington's convictions on two other firearms counts, which did not require a prior conviction as a predicate. *Id.* at 1127. Because only Arrington sought this Court's review of the Fifth Circuit's decision, the question presented by this case was not raised in the petition for a writ of certiorari in *Arrington*.

2. The Legislative History Confirms The Plain Meaning Of The Statutory Language

In view of the unambiguous statutory language, it is perhaps not surprising that petitioner has neglected even to address the wording of Section 5021,[13] but rather attempts to rely (Br. 14-20) on the legislative history and "policy" arguments derived from it. Nevertheless, "[w]hen the terms of a statute are unambiguous, [this Court's] inquiry comes to an end, except 'in "rare and exceptional circumstances."'" *Howe* v. *Smith*, 452 U.S. 473, 483 (1981) (citations omitted). No such rare and exceptional circumstances are present here; to the contrary, the legislative history of Section 5021 strongly reinforces the plain language of the statute.

a. The Act was the outgrowth of the efforts of a committee of federal judges appointed by Chief Justice Stone under the auspices of the Judicial Conference to study the general subject of punishment for crime, including the treatment of youthful offenders. In 1942, the Committee issued a report to the Conference that contained a draft of an act to provide a correctional system for both adult and youth offenders. The proposals regarding youth offenders were largely adopted by Congress in 1949 in the bill that became the YCA. See *Durst* v. *United States*, *supra*, 434 U.S. at 544; *Dorszynski* v. *United States*, *supra*, 418 U.S. at 432 & n.8, 437. In particular, the report contained a predecessor provision to Section 5021(a) that reveals the same import as the language in the Act as eventually passed:

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[13] Indeed, in the petition for a writ of certiorari (at 7) petitioner acknowledged that "the language of section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them * * *." If anything, the language of subsection (b) is even clearer.

> Upon the unconditional discharge by the Authority of a youth offender before the expiration of six years from the date of his conviction, where an original sentence was not imposed on such youth offender, and upon the unconditional discharge by the Authority of a youth offender upon whom an original sentence was imposed, before the expiration of the original sentence, the conviction shall be automatically set aside and held for naught, and the Authority shall issue to the youth offender a certificate to that effect.

Report to the Judicial Conference of the Committee on Punishment for Crime 19-20 (1942) (Draft of an Act Recommended by the Committee to Provide a Correctional System for Adult and Youth Offenders Convicted in Courts of the United States, Title III, Sec. 13).

Hearings were held on the Committee's proposal in 1943[14] and again in 1949. Although the set-aside provisions contained in the two Senate bills on which the 1949 hearings were held varied slightly to reflect the different sentencing options made available by the two bills (see *Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 2 (S. 1114, Sec. 5013), 5-6 (S. 2609, Sec. 5010) (1949) ("Hearings")), the language of the provision remained clear in requiring that a set-aside would be granted only if the youth offender were discharged before the expiration of whatever maximum term had been imposed on him. Thus, Section 5025 of S. 1114, 81st Cong., 1st Sess. (1949), which provided for commitment under the Act only for the six-year indetermi-

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[14] *Federal Corrections Act: Hearing on S. 895 Before a Subcomm. of the Senate Comm. on the Judiciary*, 78th Cong., 1st Sess. (1943); *Federal Corrections Act and Improvement in Parole: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 78th Cong., 1st Sess. (1943).

nate term now contained in Sections 5010(b) and 5017(c), provided:

> Upon the unconditional discharge by the Board of a youth offender before the expiration of six years from the date of his conviction, the conviction shall be automatically set aside and the Board shall issue to the youth offender a certificate to that effect * * *.

Hearings, *supra*, at 4. Section 5021 of S. 2609, 81st Cong., 1st Sess. (1949), the bill actually passed, was phrased slightly differently, reflecting the fact that that proposal made available two types of sentences of commitment under the Act—the six year indeterminate sentence or any longer term authorized by law for the offense in question (Hearings, *supra*, at 7):

> Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect * * *.[15]

Comments made by the Act's authors during the 1949 hearings confirm that they intended the set-aside provision to operate in favor of only those youth offenders who were discharged prior to the expiration of the sentence imposed on them, as a reward for exemplary behavior, and not for every youth offender who merely completed his term. For example, Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, a member of the Judicial Conference

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[15] The set-aside provision contained in each of these bills concluded with the statement that the certificate issued to the youth offender "shall have the same legal effect as a pardon." Hearings, *supra*, at 4, 7. This language was later stricken from S. 2609 by means of a technical amendment, without debate. 96 Cong. Rec. 8267 (1950); Hearings, *supra*, at 71.

Committee that had originally proposed the Act,[16] commented on the set-aside provision (Hearings, *supra*, at 14; emphasis added):

> Committed youth offenders who *earn* their final discharge *before the end of their maximum term* have their records cleared and all their civil rights restored.

He later reiterated (*id.* at 19; emphasis added):

> Eventually, if he is ready to emerge as a rehabilitated citizen, there are no impediments to release. When the Division turns them out *ahead of their maximum sentence*, this law blots out their sentence and lets them go without any stigma on their life * * *.

Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, another member of the original committee, expressed the same idea (*id.* at 45):

> [T]here is one feature in this bill which is very salutary and that is that if the youth offender is reclaimed in the opinion of the Board and they decide to release him, they can strike out the sentence imposed upon him and completely set aside his conviction * * *.

The Senate Report similarly explains Section 5021 as follows (S. Rep. No. 1180, 81st Cong., 1st Sess. 2 (1949)):

> If [the youthful offender] has responded to treatment and the Youth Division is of the opinion that his rehabilitation has been accomplished, the youth offender may be discharged unconditionally before the full maximum term has expired, in which event the conviction shall be automatically set outside [sic] and the Division shall issue to the youth offender a certificate to that effect.

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[16] As this Court noted in *Dorszynski* v. *United States*, *supra*, 418 U.S. at 437, the views of the judges who helped draft the Act are "of particular importance."

See also *id.* at 11; H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950).

To be sure, the foregoing history of Section 5021(a) "is not determinative on the specific question posed by this case" (Br. 17), that is, the meaning of Section 5021(b), which was not added until 11 years later. Nevertheless, it is quite illuminating, particularly in view of the similarity between the language employed in the two provisions and the express intent (see page 22, *infra*) of the Congress that added Section 5021(b) to extend the same set-aside benefit to probationers as the original Act already afforded committed youth offenders.

Moreover, petitioner errs in contending (Br. 16-17) that Congress' intent in the original Section 5021, to reward with a set-aside committed youth offenders who were discharged before the expiration of six years or of a greater adult-length sentence, supports his right to a set-aside because he was unconditionally discharged from probation after only two years. As the legislative history described above makes clear, the reason committed youth offenders were given a set-aside under those circumstances was because the six-year or greater adult-length sentence was the sentence *actually imposed on them.*[17] Petitioner's suggestion thus ignores the clear import of the set-aside provision, which focuses not on whether the length of time served amounts to less than the statutory maximum, but rather on whether the offender, because of exemplary behavior, is discharged before the expiration of whatever sentence was imposed on him. Hence, to the extent that the language and history of Section 5021(a) are instructive with respect to the meaning of the subsequently added Section 5021(b), they support the court

[17] The six-year indeterminate sentence is the only sentence that a court can impose on a youth offender under Section 5010(b).

of appeals' construction that, regardless of the length of the probationary term imposed, the youth offender must receive his discharge *before* the end of that time in order to earn a set-aside.

b. In 1961, the YCA was amended to add the specific set-aside provision that is at issue here, 18 U.S.C. 5021(b):

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court*, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Pub. L. No. 87-336, 75 Stat. 750 (emphasis added). The stated purpose of the amendment was to correct an inconsistency in the Act by extending the same set-aside benefit to probationers as was already available to committed youth offenders. H.R. Rep. No. 433, 87th Cong., 1st Sess. 1 (1961); S. Rep. No. 1048, 87th Cong., 1st Sess. 1 (1961). That Congress intended the set-aside provision to extend only to probationers who were unconditionally discharged prior to the expiration of the probationary term imposed on them thus is apparent from the Committees' description of the set-aside relief then available only to incarcerated youths: "The Federal Youth Corrections Act (18 U.S.C. 5021, *et seq.*) provides that upon the unconditional discharge of a committed youth offender *before the expiration* of *his* maximum sentence, the conviction shall automatically be set aside by the U.S. Board of Parole." H.R. Rep. No. 433, *supra*, at 1 (emphasis added); S. Rep. No. 1048, *supra*, at 1 (emphasis added).[18]

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[18] Petitioner attempts to rely (Br. 19) on language in the reports that describes Section 5021(a) as providing that "a youth offender who has been committed or incarcerated is entitled

This conclusion is bolstered by comments contained in two letters that were included in both reports. In a letter to the House Judiciary Committee Chairman, the Deputy Attorney General described the original provision and the amendment as follows (H.R. Rep. No. 433, *supra*, at 3 (emphasis added); S. Rep. No. 1048, *supra*, at 3 (emphasis added)):

> The Federal Youth Corrections Act (18 U.S.C. 5021 et seq.) provides that upon the unconditional discharge of a committed youth offender *before the expiration of his maximum sentence*, the conviction shall automatically be set aside and the Youth Division of the U.S. Board of Parole shall issue to the youth offender a certificate to that effect.
>
> This bill would add a new subsection to section 5021 to provide that upon the unconditional discharge of a youth offender *prior to the maximum expiration period of his probation fixed by the court*, his conviction shall be automatically set aside and the court shall issue a certificate to that effect.

The Judicial Conference likewise explained the original provision and the proposed amendment in a letter to the Speaker of the House (H.R. Rep. No. 433, *supra*, at 2 (emphasis added); S. Rep. No. 1048, *supra*, at 2 (emphasis added)):

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upon discharge to have his conviction set aside" and that explains that Section 5021(b) was intended to extend the same relief to YCA probationers. H.R. Rep. No. 433, *supra*, at 1; S. Rep. No. 1048, *supra*, at 1. From this, petitioner reasons (Br. 20) that any youth offender who serves his full sentence under the Act is entitled to a set-aside upon discharge. Petitioner's suggestion, however, flies in the face of the plain language of the two statutory provisions as well as the clearly expressed legislative intent underlying Section 5021(a) to use the possibility of securing a set-aside as an inducement to rehabilitation. Accordingly, the introductory description on which petitioner relies can have been intended only as a simplified and incomplete statement of the amendment's import.

> Under section 5021 as now written the "committed" youth offender is given a certificate by the Youth Correction Division that his conviction has been set aside, upon his unconditional discharge by the Division *before the expiration of the maximum sentence imposed upon him.* Under the proposed amendment the court would issue a similar certificate to the youth offender on probation when the court unconditionally discharges him from probation *prior to the maximum period of probation theretofore set by the court.*

Senator Dodd, the sponsor of Section 5021(b) (107 Cong. Rec. 8708 (1961)), gave a similar explanation of the original provision and the amendment to it on the floor of the Senate (*id.* at 8709) (emphasis added):

> The first of the two proposals [19] would amend the Youth Corrections Act to *make consistent* the treatment of the youth offenders on probation with that of youths committed to Federal institutions.
>
> Under section 5021 of title 18, a committed youth who is unconditionally discharged *before the expiration of the maximum sentence imposed upon him* automatically has his conviction set aside. No such provision exists for the youth who is released from probation. * * *
>
> I think section 5021 represents an important factor in the treatment of youthful offenders. *It provides an additional incentive for maintaining good behavior* by holding out to the youth an opportunity to clear his record.
>
> * * * * *
>
> The two amendments, when considered together, suggest the attitude of the Federal Government

---

[19] Two amendments were being considered together; the second was an addition to the Juvenile Delinquency Act to make juvenile escapees liable to prosecution under the Escape Act, 18 U.S.C. 751. See 107 Cong. Rec. 8708-8709 (1961) (remarks of Sen. Dodd).

> to juvenile delinquency. *For those youths who demonstrate a willingness to help themselves*, every reasonable opportunity is afforded to assist them in making a new start.[20].

Once again, not only is the plain meaning of the statute confirmed, but the intent to make the set-aside benefit selective in nature, offered only as a reward for good behavior, is reiterated. This intent is entirely consistent with the overall rehabilitative purpose of the YCA, for the possibility of a set-aside is held out to the youth offender as a benefit he can earn if he takes full advantage of the treatment or supervision afforded him and rehabilitates and reintegrates himself into society. Obviously, then, the determination whether the benefits flowing from a set-aside should be afforded a particular youth offender can be made only during the course of his treatment or supervision. But the construction placed on Section 5021 by the Fifth Circuit in *Arrington* and by petitioner here thwarts this rehabilitative purpose.

Under the *Arrington* view—that a set-aside is available to every youth offender upon completion of his YCA sentence—the decision whether the youth offender will be afforded a set-aside of his conviction would

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[20] Without mentioning this unequivocal explanation by the sponsor of the bill, petitioner cites (Br. 6-7, 19-20), instead, an unintelligible remark made by Senator Dodd on the same occasion concerning the situation of a YCA probationer prior to the amendment under consideration. Senator Dodd had commented (107 Cong. Rec. 8709 (1961)) that without the amendment the conviction of a youth offender released from probation "remains on the record until the original sentence expires." But this observation was simply inaccurate, since it is plain that there was no set-aside provision of any sort in favor of probationers under the original Act. See, e.g., H.R. Rep. No. 433, *supra*, at 1; S. Rep. No. 1048, *supra*, at 1. Moreover, although petitioner cites this incomprehensible remark of Senator Dodd, he provides not even a hint of how it advances his position.

turn not at all on the quality of the youth offender's response to treatment, but solely on the initial decision to impose a YCA sentence rather than an adult sentence—a decision made at a time when it is impossible to tell whether the offender's subsequent behavior will demonstrate sufficient rehabilitation to merit set-aside relief. Petitioner, who was placed on YCA probation, has a more modest argument available, viz., that a YCA probationer's mere completion of and unconditional discharge from probation shows the kind of rehabilitation justifying a set-aside of the conviction, presumably because the sentencing court could have revoked the probation had the youth offender violated any of the probationary terms. That argument also must be rejected, however, as inconsistent with the language and policy of the Act. Congress' intent that a youth offender *earn* the set-aside of his conviction through his complete rehabilitation would not be satisfied by the mere negative of his avoiding the revocation of probation, but rather requires some positive behavior on behalf of the offender that warrants the *affirmative* action of *early* discharge from probation.

In sum, the history of both Sections 5021(a) and 5021(b) strongly reinforces the intent unambiguously evident from the statutory language: that only those youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them are entitled to have their convictions set aside.

3. The Decision Below Coincides With The Construction Of Section 5021 That Has Consistently Been Placed On It By The Agencies Charged With Its Administration

"Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time." *United States* v. *Clark*, 454 U.S. 555, 565

(1982). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Here, the agencies responsible for administering Section 5021 have consistently construed it as affording set-aside relief only to those youth offenders who are unconditionally discharged prior to the expiration of the sentence imposed on them.

a. The original Act created within the Board of Parole a Youth Correction Division. Among the Division's responsibilities was the release of committed youth offenders conditionally under supervision, the unconditional discharge of such offenders, and the issuance to committed youth offenders of certificates reflecting the set-aside of their convictions, when appropriate. 64 Stat. 1086, 1088-1089. In 1976, the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 *et seq.*, transferred the functions previously performed by the Parole Board, including its Youth Correction Division, to the United States Parole Commission. Both bodies have consistently construed Section 5021(a) as entitling only those committed youth offenders who are unconditionally discharged prior to the expiration of the sentences imposed on them to set-aside of their convictions.

As early as its first annual report, issued in 1954, the Parole Board described its procedures for the control and movement of committed youth offenders as including "[d]ischarge—unconditional upon expiration; *also unconditional prior to expiration with conviction set aside*" (*United States Board of Parole Annual Report 1954*, at 14; emphasis added). Moreover, since at least 1963, Department of Justice regulations have provided for an automatic set-aside "[w]hen an unconditional discharge has been granted to a youth offender *prior to*

the expiration of his maximum term of sentence * * *." 28 C.F.R. 2.44 (1963) (emphasis added).[21]

b. The courts administer the discharge of youth offenders from probation and the issuance of set-aside certificates to probationers under 18 U.S.C. 5021(b). Section 3656 charges the Director of the Administrative Office of the United States Courts with "promot[ing] the efficient administration of the probation system and the enforcement of the probation laws in all United States courts." Pursuant to this responsibility, the Administrative Office has, since 1949, published a Probation Officers Manual, which sets forth the practices and procedures governing the probation system.[22] The edition of the manual published in 1962, the year after Section 5021(b) was added to the YCA, explained that provision as follows:

> *DISCHARGES.* A. *Unconditional.* When a youth offender has been placed on probation, the court may "unconditionally discharge" him from proba-

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[21] The regulation continued in virtually the same form until 1976, when it was amended to provide:

> § 2.43 Early termination of parole.
>
> (a)(1) Upon its own motion or upon request of the parolee, the [Parole] Commission may terminate supervision, and thus jurisdiction, over a parolee prior to the expiration of his maximum sentence. A committed youth offender may be granted an early termination of jurisdiction (unconditional discharge) at any time after one year of continuous supervision on parole.
>
> * * * * *
>
> (6) When termination of jurisdiction prior to the expiration of sentence is granted in the case of a youth offender, his conviction shall be automatically set aside. A certificate setting aside his conviction shall be issued in lieu of a certificate of termination.

The same language is currently set forth at 28 C.F.R. 2.43(a)(1), (a)(2).

[22] Any individual district court may, of course, modify or elaborate on the procedures established by the Administrative Office. See generally 18 U.S.C. 3651, 3654.

> tion *prior to the expiration of the maximum period of probation.* The discharge automatically sets aside the conviction and the court issues a certificate to that effect. * * *
>
> B. *Notifying FBI of Certificate of Vacation of Conviction.* When a youth offender on probation is discharged *prior to the maximum period of probation fixed by the court,* an FBI Disposition Sheet * * * should be sent to the Identification Division of the Federal Bureau of Investigation * * *.

Administrative Office of the United States Courts, [*1962*] *United States Probation Officers Manual* ¶ 9.43 (Nov. 1, 1962) (emphasis added). See also Administrative Office of the United States Courts, [*1978*] *Guide to Judiciary Policies and Procedures: Probation Manual* § 3202 (Nov. 1, 1978); Administrative Office of the United States Courts, [*1973*] *United States Probation System Operations Manual* ¶ 5.24B (July 2, 1973).

We noted above (note 9, *supra*) petitioner's claim that, contrary to established procedures of the District of Columbia Superior Court Probation Department, his case was not brought to the attention of the sentencing court 30 days prior to the expiration of his sentence so as to remind the court of the possibility of granting him an early unconditional discharge from probation and, hence, a set-aside of his conviction. The Administrative Office's 1973 and 1978 Probation Manuals contain a similar requirement (emphasis added):

> In the case of each youth offender or young adult offender probationer the probation officer shall make a report to the court not later than 90 days prior to the expiration of the period of probation fixed by the court. The report should evaluate the probationer's conduct and progress. *It should also remind the court that unconditional discharge from probation prior to expiration will automatically set aside the conviction (18 U.S.C. 5021(b)).*

1973 Manual, *supra*, at ¶ 4.10B; see also *1978 Manual*, *supra*, at § 5011.

As we observed above, the questions whether such procedures were complied with in petitioner's case and the effect of any noncompliance are not properly before this Court. Nevertheless, the existence of such procedures is one more example of the consistent administrative construction of Section 5021(b), which comports precisely with the decision below.

B. SENTENCING PETITIONER AS A RECIDIVIST UNDER D.C. CODE § 22-3204 ON THE BASIS OF HIS PRIOR YCA CONVICTION VIOLATES THE POLICY OF NEITHER THE YOUTH CORRECTIONS ACT NOR THE D.C. STATUTE

1. A YCA Conviction Is An Appropriate Basis For A Subsequent Recidivist Penalty

In the alternative, petitioner argues (Br. 12-14, 25-29) that even if his conviction need not be treated as set aside under Section 5021(b), it nevertheless cannot be used as the basis for a subsequent recidivist penalty because to allow YCA convictions to be so used violates the policy of that Act. This argument too lacks merit.

There is nothing in either the language or the legislative history of the YCA that even suggests that convictions thereunder that are *not* set aside under Section 5021 may not subsequently be used as the basis for a recidivist penalty.[23] Nor is any policy of the Act vio-

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[23] We assume arguendo that if petitioner's YCA conviction had been set aside, he would not have been subject to the recidivist penalty contained in D.C. Code § 22-3204, noting that while there is some disagreement concerning whether Section 5021 requires the physical destruction of the *record* of the prior conviction, the lower courts generally agree that the set-aside provision operates to vacate the conviction, so that it has no further legal effect. See, e.g., *United States* v. *Arrington*, *supra*, 618 F.2d at 1124-1125; *Doe* v. *Webster*, 606 F.2d 1226 (D.C. Cir. 1979); *United States* v. *Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977); *United States* v. *Doe*, 556 F.2d 391, 392 (6th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11, 13-14 (6th Cir. 1976);

lated by such use. The Congress that enacted the YCA was greatly concerned with the high rate of recidivism among youthful offenders and intended, by passage of

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United States v. *McMains*, 540 F.2d 387, 389 (8th Cir. 1976); *Mestre Morera* v. *INS*, 462 F.2d 1030, 1032 (1st Cir. 1972); *United States* v. *Henderson*, 482 F. Supp. 234 (D.N.J. 1979); *United States* v. *Hall*, 452 F. Supp. 1008, 1013 (S.D.N.Y. 1977); *State* v. *Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); *People* v. *Garcia*, 402 N.Y.S.2d 164, 166-167 (Sup. Ct. 1978). See also *Stevenson* v. *United States*, 380 F.2d 590, 593-594 (D.C. Cir.), cert. denied, 389 U.S. 962 (1967). Cf. *New Banner Institute, Inc.* v. *Dickerson*, 649 F.2d 216, 219-221 (4th Cir. 1981), cert. granted, No. 81-1180 (argued Nov. 29, 1982) (conviction expunged under state law not an appropriate basis for denying firearms license under the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*).

Nevertheless, we question whether the rehabilitative purposes of the Act are furthered by precluding the use of a set-aside YCA conviction as a basis for a subsequent recidivist penalty (see discussion at page 32, *infra*). Contrary to petitioner's assertions (Br. 21-22), 18 U.S.C. App. 1202(a)(1), which was involved in *Arrington*, *Purgason*, and *Fryer*, is not a recidivist statute. Rather, it is a firearms disability, which, in the absence of set-aside and expungement statutes, would apply to all ex-offenders regardless of their post-conviction conduct. The enhanced penalty provision of D.C. Code § 22-3204, by contrast, is a recidivist statute, which renders an ex-offender liable for harsher penalties only by virtue of his commission of a subsequent offense (see note 5, *supra*). While it is arguable that a set-aside of a conviction should permit the youth offender to enjoy the same rights the rest of the population possesses to bear arms, we can conceive of no reason for protecting him from harsher penalties if he commits a subsequent crime. See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U.L.Q. 147, 160 ("It is not for the confirmed recidivist that primary concern about restoration of status is due, but for the first offender—the 'accidental' criminal, if you will—whose violative conduct never reoccurs"). See also *id.* at 189; Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, 66 Ky. L.J. 741, 756-757 (1978). Accordingly, even if *Arrington*, *Purgason*, and *Fryer* were decided correctly in this respect, they do not compel the further holding that a set-aside YCA conviction cannot be the basis for a subsequent recidivist penalty. The Court need not resolve that question

the Act, to encourage the successful rehabilitation and reintegration into society of such individuals. *Ralston* v. *Robinson*, 454 U.S. 201, 206 (1981); *Durst* v. *United States*, *supra*, 434 U.S. at 544-545; *Dorszynski* v. *United States*, *supra*, 418 U.S. at 432-433; *id.* at 447-448 (Marshall, J., concurring). To these ends, Congress made available to the youth offender a special program of treatment and supervision, as well as the opportunity, through good behavior, to remove from his record the stigma of conviction. But where the offender has failed to respond to the special treatment afforded by the YCA program, as evidenced by his return to crime, no purpose of the YCA would be served by exempting him from harsher penalties simply because he once appeared to be a candidate for successful rehabilitation.

In view of the foregoing, it is perhaps not surprising that petitioner has cited no case law or other support for the novel proposition that a YCA conviction cannot serve as the basis for a subsequent recidivist penalty. Nor are we aware of any such authority. By contrast, every state court that has been faced with the question has held that YCA convictions not set aside pursuant to Section 5021 are appropriate bases for increased penalties under state second offender statutes. See *State* v. *Cummings*, 607 S.W.2d 685, 688 (Mo. 1980); *State* v. *Pacheco*, 121 Ariz. 88, 89-90, 588 P.2d 830, 832-833

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here, it being a matter of construction of District of Columbia law to be considered on remand in the event petitioner secures a reversal on the set-aside issue that is now before this Court.

The consequences flowing from the grant of a set-aside under Section 5021 are discussed in Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, *supra*; Comment, *Expungement of Criminal Records Under the Youth Corrections Act*, 62 Iowa L. Rev. 547 (1976); Schaefer, *The Use of Expunged Convictions in Federal Courts*, 35 Fed. B.J. 107 (1976); Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction*, 39 Fed. Probation 31 (Sept. 1975); and Gough, *supra*.

(1978); *People* v. *Celli*, 430 N.Y.S.2d 949, 952-953 (Westchester County Ct. 1980). Cf. *Lewis* v. *United States*, 445 U.S. 55, 65 (1980); *United States* v. *Brzoticky*, 588 F.2d 773, 775 (10th Cir. 1978); *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978).

Moreover, although no other federal court of which we are aware has been required to rule on the relationship between the YCA and recidivist statutes, the District of Columbia Circuit has considered the precise interface at issue here—that of the YCA and D.C. Code § 22-3204—and has indicated that it would not accept petitioner's ipse dixit. In *Stevenson* v. *United States*, 380 F.2d 590 (D.C. Cir.), cert. denied, 389 U.S. 962 (1967), in which the court held that a set-aside of a conviction under Section 5021 does not warrant the destruction of fingerprints taken in connection with the conviction (380 F.2d at 593-594), it also noted the salutary consequences that may flow from a set-aside. In particular, the court of appeals distinguished between a YCA conviction that had been set aside and one that had not been for purposes of a subsequent conviction and sentence under D.C. Code § 22-3204:

> For example, under D.C. Code § 22-3204 (1961), a first offender might have a record of conviction of a misdemeanor, only, with imprisonment for not more than one year, but for a second offense under that section he might be sentenced to imprisonment for not more than ten years. * * * Obviously, setting aside a first "conviction" under the Youth Corrections Act can be truly meaningful.

But see note 23, *supra*.

2. The Enhanced Penalty Provision Contained In D.C. Code § 22-3204 (1973) Is Triggered By A Prior YCA Conviction

The relevant language of D.C. Code § 22-3204 (emphasis added) is perfectly clear:

> Whoever violates this section shall be punished as provided in section 22-3215, *unless the violation occurs after he has been convicted* in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

As the Court said of similar language contained in 18 U.S.C. App. 1202(a)(1) (*Lewis* v. *United States*, 445 U.S. 55, 60 (1980) (citation omitted)): "No modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.' 'Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions [were not under the YCA]].'" There is thus not even a suggestion in the language of the District of Columbia statute that its enhanced penalty provision was not intended to be triggered by a YCA conviction.

Petitioner asserts (Br. 13-14), however, that "Section 22-3204 of the D.C. Code which penalizes the carrying of concealed weapons was originally enacted in 1932. The drafters of that provision could not have been thinking about the role that FYCA convictions would play in the repeat-offender scheme developed in section 22-3204." But while the portion of Section 22-3204 defining the substantive offense was enacted in 1932 (Act of July 8, 1932, ch. 465, Section 4, 47 Stat. 651), the enhanced penalty provision under which petitioner was sentenced was not added until 1953 (67 Stat. 94), three years after enactment of the YCA and one year after it was made applicable to the District of Columbia (66 Stat. 45). Moreover, the legislative debate on the Act that contained the enhanced penalty provision focused specifically on the relationship between the proposed legislation and the YCA.

The enhanced penalty provision was added to D.C. Code § 22-3204 by the District of Columbia Law En-

forcement Act of 1953, ch. 159, Section 204(c), 67 Stat. 94. In addition to amending Section 22-3204, the 1953 Act also established mandatory minimum sentences for certain crimes committed by a second offender. Section 201(a), 67 Stat. 91-92. As originally drafted, the latter section of both the House and Senate bills included a provision making sentencing under the YCA unavailable to persons subject to the mandatory minimum sentences; moreover, the House bill established minimum sentences for certain crimes even when committed by a first offender. H.R. Rep. No. 514, 83d Cong., 1st Sess. 3-4 (1953); S. Rep. No. 364, 83d Cong., 1st Sess. 3-4 (1953). During debate on the Senate bill, Senator Morse expressed his objection to what he viewed as the bill's "effect of weakening the Youth Corrections Act." 99 Cong. Rec. 6421 (1953). He explained (*ibid.*):

> Before the new Federal Youth Corrections Act can get into operation and be given a chance to prove its value, the Congress is now proposing to scrap it in effect as it applies to the District of Columbia. Under paragraph (d) on page 6 of the bill, the Youth Corrections Act is repealed as it will affect nearly 40 percent of the cases arising in the District of Columbia.
>
> * * * * *
>
> Now under the proposal a young person 21 years of age and under who is found guilty of housebreaking, for instance, stealing a bottle of whiskey from a liquor store, will even on first offense not be eligible for after-care treatment by the Youth Corrections Board.[24]

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[24] In support of his objections to the bill, Senator Morse offered a letter from Chief Judge Bolitha J. Laws of the District of Columbia, who had been a member of the judicial committee that drafted the original YCA. Judge Laws expressed the same concern for the proposed law's effect on the YCA. 99 Cong. Rec. 6422-6423 (1953).

Senator Barrett attempted to alleviate Senator Morse's concern by pointing out that, under the Senate bill, the mandatory minimum sentence applied only to second offenses. 99 Cong. Rec. 6421 (1953). Nevertheless, the provision prohibiting application of the YCA to defendants who were subject to the mandatory minimum penalties ultimately was stricken. 99 Cong. Rec. 6631-6633 (1953).[25]

It is thus evident that the Congress that enacted the enhanced penalty feature of D.C. Code § 22-3204 was well aware of the existence of the Youth Corrections Act and the implications it would have for sentencing procedures in the District of Columbia. Although the debate focused on the portion of the bill dealing with mandatory sentences, the presence in the same bill of an enhanced penalty for second offenders under D.C. Code § 22-3204 could not have escaped Congress' attention. Congress nevertheless did not exclude YCA convictions from the category of convictions that could trigger the recidivist penalty provision of Section 22-3204. Accordingly, petitioner was correctly sentenced under the enhanced penalty provision on the basis of his prior YCA conviction.

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[25] We note, however, that under current law certain multiple offenders in the District of Columbia are ineligible for sentencing under the YCA, notwithstanding their qualifying age. See D.C. Code § 22-3201(d)(1).

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I.

The Language Of Section 5021(a) and (b), Especially Section 5021(b), Is Far From Clear.

The application of the plain language rule has forever been complicated by the fact that "whether or not the words of a statute are clear is not always clear." *Barbee* v. *United States*, 392 F.2d 532 (5th Cir. 1968), *cert. denied*, 391 U.S. 935. Petitioner contends that the language of section 5021(b) should be construed in a manner that supports his claim. Respondent asserts that "the pertinent statutory language could not be clearer and it leaves no room for the construction urged by petitioner." (Br. 6). Respondent quotes the statute for the proposition that, "a youth offender who is placed on probation shall have his FYCA conviction automatically set aside if the sentencing court, 'in its discretion, inconditionally discharges such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the Court.*' " (Br. 10, emphasis in original).

Petitioner does not take issue with this quotation of the language of the statute. He does, however, deny the accuracy of the conclusion drawn by respondent from the statutory language: "The wording of the statute itself thus compels the conclusion that a FYCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender *before* the expiration of *his* sentence, whether of probation or incarceration." (Br. 10-11, first emphasis in text, second emphasis added). This is *not* what the statute says. An important qualifer has been added, "his", and an important qualifer has been dropped, "maximum." Indeed, in no less than nine formulations of the meaning of section 5021, respondent never includes the word "maximum" even though it

appears in both 5021(a) and 5021(b), and in the legislative history excerpts cited by respondent at Br. 19-20, 23-24.[1]

Why does this matter? It is critical because petitioner and respondent agree that under section 5021, the set aside of a conviction occurs only when *early* unconditional discharge is granted.[2] The question is, what is early? Is an early discharge one prior to the end of the sentence initially imposed? Or is it one prior to the end of the longest sentence that could have been imposed (the determination reached by the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119, *cert. denied*, 449 U.S. 1086)? Or, is it one that occurs in less than six years from the date of the youthful offender's conviction or such longer adult sentence that may be imposed?

In this case, the answer to what is "early" depends on the meaning given to "the maximum period of probation theretofore fixed by the court" in section 5021(b). Petitioner and respondent agree that "the maximum sentence

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[1] In addition to p. 11, see also Br. 6, "the plain language of the statute, which unequivocally restricts the availability of set-aside relief to those YCA probationers who are unconditionally released *before* the expiration of the probationary term imposed on them"; p. 13, "prior to the expiration of the sentence imposed on them"; p. 16, "prior to the expiration of the sentence"; p. 19, "prior to the expiration of the sentence imposed on them"; p. 22, "prior to the expiration of the probationary term imposed on them"; p. 26, "prior to the expiration of the sentence imposed on them"; and p. 27, "prior to the expiration of the sentence imposed on them" and "prior to the expiration of the sentences imposed on them."

[2] Respondent ascribes to petitioner the position that the quality of the youth offender's response to treatment is irrelevant for purposes of section 5021. This is not true. As summarized at p. 25 of his Brief, petitioner's position is that the youth's discharge must be "unconditional and timely," i.e., earned prior to the expiration of the *maximum* sentence or term imposed or fixed.

imposed upon him," as it is used in section 5021(a), is six years or a greater adult-length sentence as would correspond with section 5010(b) and (c). (Pet. Br. 16-17, R. Br. 21). Section 5010(a), however, does not specify a "maximum" period of years for which probation may be imposed.

Respondent asserts that this does not matter because section 5021 "focuses not on whether the length of time served amounts to less than the statutory maximum, but rather on whether the offender, because of exemplary behavior, is discharged before the expiration of whatever sentence was imposed on him." (Br. 21). Yet, as the lack of any citation of authority for this contention suggests, the statute does not say "whatever sentence" or "sentence actually imposed." The statute uses the word "maximum," as one would expect in legislation establishing a scheme of more indefinite sentencing.

It is superficially plausible that the "maximum period of probation theretofore fixed by the court" is the period of probation initially imposed by the sentencing judge, as respondent presumes. This construction, however, could lead to bizarre results. In the District of Columbia, for example, upon the expiration of a term of probation, a court may discharge a probationer from further supervision or it may extend the probation. (D.C. Code § 24-104). If a youth offender were released prior to the end of that extended term of probation (whatever length it may be), would he receive the benefits of section 5021(b) as one discharged prior to the end of the "maximum period . . . theretofore fixed," even though a youth offender released at the end of the term of probation initially imposed would not qualify? Such a result would be contrary to the intent of those who devised section 5021 as a means of rewarding good behavior and providing a second chance to deserving youths. (Br. 17-18).

The Federal Probation Act, 18 U.S.C. § 3651, provides that the maximum probationary term that may be imposed for a federal crime is five years. It is plausible that this is the "maximum period" to which section 5021(b) refers.[3] *See* Br. 5, n.3. However, the District of Columbia Court of Appeals has determined that the Federal Probation Act does not apply to the District of Columbia. *Sanker* v. *United States*, 344 A.2d 304 (D.C.C.A. 1977). What then is the "maximum period of probation theretofore fixed by the court" in the District of Columbia? The six-year maximum term provided in section 5010(b) and section 5017(c) of the FYCA would seem to be the best benchmark for measuring whether there has been an "early" discharge from Federal Youth Corrections Act probation so as to qualify the youth for the set aside of his conviction pursuant to section 5021(b).

In summary, a genuine question exists as to when an unconditional discharge must be granted in order to set aside the conviction of a youth offender under section 5021(b). The legislative history cited by respondent at pp. 22-25 does not address, let alone resolve, this question, nor do the decisions cited by respondent at p. 15.[4] More-

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[3] Section 5023(a) of the Federal Youth Corrections Act preserves all court authority under the Federal Probation Act.

[4] The decision in *Nast* v. *United States*, 415 F.2d 338 (10th Cir. 1969) did not deal with the question of when conviction set aside occurs under section 5021. Rather, the court held that a youth offender who escaped while waiting transfer to a federal youth facility may be given a sentence for the escape, consecutive to his FYCA sentence. The cases of *United States* v. *Bronson*, 449 F.2d 302 (10th Cir. 1971), *cert. denied*, 405 U.S. 949 and *Cunningham* v. *United States*, 461 F.2d 995 (9th Cir. 1972) both involved the adequacy of information provided to youth offenders who volunteered guilty pleas. Both courts described the set-aside benefits of section 5021 as being unavailable to a youth offender who is held for "the maximum sentence"

over, respondent's view that the word "maximum" equals "actual" or "whatever" leads to respondent's basic misunderstanding of *United States* v. *Arrington*.

II.

The Fifth Circuit in *United States* v. *Arrington* Determined That "The Maximum Sentence" Referred To In Section 5021(a) Is The Maximum Sentence Which Could Have Been Imposed Under The Federal Youth Corrections Act.

Respondent describes the holding of the Fifth Circuit in *United States* v. *Arrington* as, "every committed youth

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(449 F.2d at 305, 461 F.2d at 996). Similarly, in *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir.) (en banc), *cert. denied*, 414 U.S. 869 (1973) and *Tatum* v. *United States*, 310 F.2d 854, 855-856 (D.C. Cir. 1962), the courts described section 5021 as providing for the automatic setting aside of the conviction of a youth offender who is unconditionally released before the expiration of the "maximum" term. *See also Watts* v. *Hadden*, 651 F.2d 1354, 1379 (10th Cir. 1981) (citing *Arrington* in support).

In *Doe* v. *Webster*, 606 F.2d 1226, 1236-1237 (D.C. Cir. 1981), the court refers to the same legislative history discussed in Respondent's Brief (pp. 19-20). Again, the key phrase used by the court to describe when unconditional release will trigger the set aside of a conviction is "before the end of their maximum term." The decision of the court in *Doe* does not set out facts sufficient to determine whether or not the offender in that case was released prior to the expiration of any given term of probation.

Finally, in *Preston* v. *McCall*, 542 F. Supp. 249, 251 (E.D.N.C.), *aff'd*, 688 F.2d 834 (4th Cir. 1982) (table), the court determined that a 1973 bank robbery conviction could be considered for purposes of parole for later offense because the offender had completed a term of imprisonment. In doing so, the court disapproved of *Arrington*, describing the holding in the case as, "expunction of a committed youth offender conviction was automatic upon unconditional discharge at the end of the maximum sentence." (542 F. Supp. at 251.) As will be discussed *infra*, this is the same interpretation of *Arrington* as that adopted by Responent. It is not, however, what the Fifth Circuit held in *Arrington*.

offender is entitled, upon his eventual unconditional discharge, to a set-aside of his conviction under 18 U.S.C. § 5021(a)." (Br. 6). This reading of the opinion is in error, however, because it ignores the court's discussion of the "broad range of sentencing options available" to the trial court, as well as the court's determination that, "the trial court in Arrington's case would have taken into account the mandatory discharge provision before choosing the appropriate sentence." 618 F.2d at 1123, Pet. 7, Br. 21-22. Respondent may disagree with the definition of "the maximum sentence imposed" adopted by the Fifth Circuit, but the Fifth Circuit did not, as Respondent contends, "simply misread the statute, overlooking the phrase, 'before the expiration of the maximum sentence imposed upon him.' " (Br. 7; *see also* 16). The court determined in *Arrington* that the "maximum sentence" was the longest sentence that could have been imposed under the FYCA. Consequently, the unconditional discharge that Arrington received following his completion of a sentence less than that which could have been imposed entitled him to the benefits of section 5021(a).[5]

Petitioner submits that the construction of section 5021(a) adopted by the court in *Arrington* best advances the policy underlying the Youth Corrections Act. However, as respondent notes (Br. 26), petitioner's case does not depend upon approval of the *Arrington* court's definition of the "maximum" sentence for purposes of 5021(a). Petitioner maintains that the "maximum period of probation theretofore fixed by the court" under section 5021(b)

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[5] In candor, petitioner must agree with respondent that this reading of section 5021(a) is not consistent with the language of the statute specifying that the "maximum" sentence is that which was imposed, not that which could have been imposed.

is a longer term than the two year term that he served and after which he was granted an unconditional discharge. In other words, rather than contending that he could have been given a longer sentence, and therefore that the completion of the sentence that he was given triggered the automatic set aside of his conviction, petitioner contends that when he was sentenced under section 5010(a), there was actually imposed a "maximum" period of probation longer than the two year term that he served. Thus, his conviction was set aside upon his unconditional discharge.

III.

Administrative Interpretation Of Section 5021 Does Not Resolve The Question Of What Is Early Unconditional Discharge From Probation, But Does Demonstrate The Breach Of Proper Procedure In This Case.

The Parole Board regulations and the Probation Officers Manual cited at pp. 27-29 of Respondent's Brief refer to conviction set aside as occurring upon the grant of unconditional discharge "prior to the expiration of his maximum term" and "prior to the expiration of the maximum period of probation." Inasmuch as no definition of "maximum term" or "maximum period of probation" is provided, this listing of procedures does not offer a basis for judging whether petitioner's discharge was or was not prior to the expiration of "the maximum period of probation."

These administrative practices do confirm that petitioner, whose case was never brought before the sentencing judge prior to the expiration of his initial term of probation (Br. 7-8, n.6, 12 n.8), was denied the benefit of the exercise of judicial discretion contemplated by the

Federal Youth Corrections Act.[6] Because petitioner's probation officer did not submit a report to the sentencing judge 90 days or even 30 days prior to the expiration of his two-year term of probation, there was no opportunity for petitioner to be discharged prior to the end of the term of probation initially imposed. To deprive petitioner of the benefits of section 5021(b) under these circumstances is to ignore reality.

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[6] Respondent asserts that this question is "not properly before the Court." (R. Br. 12-13, n.9 and 30) Petitioner disagrees for three reasons. First the facts regarding the failure of the probation department to perform as it should have in 1973 only recently became known to petitioner. This discovery of new facts is not the same as seeking to press a procedural question regarding a trial court ruling which could have been raised below but was not, the situation before the Court in *United States* v. *Lavasco*, 431 U.S. 783, 788-89, n.7 and *Lawn* v. *United States*, 355 U.S. 339, 362-363, n.16. Second, even though the nonfeasance involved in this case was not known when the case was before the District of Columbia Court of Appeals, that court was aware that the rule requiring probation officers to report to the sentencing judge at least 30 days before a probationary term expired was frequently ignored. Remarks of Chief Judge Newman, (tape on file with office of the Clerk). Third, this issue is "fairly included" in the question posed by the Petition since it directly affects whether or not petitioner's prior FYCA conviction is an appropriate basis upon which to impose a recidivist penalty.

If petitioner's position that his FYCA conviction has automatically been set aside or, in any event, cannot be used to trigger a recidivist penalty, is determined to be in error, a motion before the trial court to exercise its discretion nunc pro tunc, as respondent suggests, may be appropriate.

IV.

Nothing In The Legislative History Or The Underlying Policies Of The Federal Youth Corrections Act Sanctions The Use Of Petitioner's FYCA Conviction As The Basis Upon Which To Impose A Recidivist Penalty.

Respondent acknowledges that in enacting the FYCA, Congress sought to provide a "special program of treatment and supervision." (Br. 32). The unique character of Federal Youth Corrections Act convictions was emphasized recently by the United States Court of Appeals for District of Columbia Circuit when it determined that a youth sentenced under the FYCA could be held for a term longer than an adult would receive for the same offense because of the Youth Act's "different purpose (its' basic theory . . . is rehabilitative) and effect (the 'conditions and terms' of confinement) are different . . ." *United States* v. *Donelson*, No. 81-2118 (December 7, 1982), slip op. p. 3. Respondent neverthless contends that FYCA convictions not set aside pursuant to section 5021 should be treated just like any other convictions for purposes of recidivist penalties. However, no showing is made as to how such use of FYCA convictions like petitioner's, where the youth responded favorably to treatment and received an unconditional discharge, serves the purposes of the FYCA or recidivist statutes. (Br. 25-27).

Contrary to respondent's claim, no state court has ever held that an FYCA conviction like petitioner's may be used to trigger increased penalties under state second offender statutes. In *State* v. *Pacheco*, 121 Ariz. 88, 89-90, 588 P.2d 830, 832-833 (1978), the court determined that Pacheco was "in no position to challenge the use of his Youth Act conviction under the recidivist provisions . . . since he neither alleged nor proved that he had completed his sentence under the Youth Act nor that he had ever been assured a certificate of vacation of conviction. . . ."

Indeed, the court noted that at the time of Pacheco's arrest, he was in federal custody for violating the parole which was a part of his Youth Act sentence.

A similar situation was before the court in *People* v. *Celli*, 430 N.Y.S.2d 949 (Westchester County Ct. 1980). Celli had violated the terms of her Youth Act sentence and had not been granted an unconditional discharge at the time she was charged with the subsequent offense.[7]

In *State* v. *Cummings*, 607 S.W.2d 685, 688 (Mo. 1980), the court refused to consider the argument that sentencing under the Youth Corrections Act is comparable to a suspended sentence in Missouri practice and does not amount to a conviction for purposes of Missouri's second offender law because the argument had not been raised at trial.[8]

Respondent rightly points out that the enhanced penalty provision of D.C. Code section 22-3204 was added shortly after the FYCA was made applicable to the District of Columbia. However, there is not a single reference in the debate or legislative history of that provision

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[7] Celli had initially been placed on probation under 5010(a) for three years. After serving only about three months of that probation, it was revoked and she was committed to the custody of the Attorney General pursuant to 5010(b). Celli was paroled after three years pursuant to 5017(c), but at the time of this case, Celli was in the process of having her parole revoked and a federal warrant had been filed, 430 N.Y.S.2d at 950-951. The situation addressed by the court in *Celli* is thus far different than the instant case.

[8] In dicta the court added that Cummings had not shown that he was entitled to receive the benefits of section 5021. However, the facts set forth in the decision do not indicate either the FYCA sentence Cummings had been given or whether he had ever received an unconditional discharge.

regarding the use or non-use of FYCA convictions such as petitioner's to trigger the recidivist penalty.[9]

There is no indication that Congress spoke to, or even anticipated, the question posed by this case in the development of either the FYCA or the District of Columbia Law Enforcement Act. The Court, therefore, should interpret the two statutes in a way that advances the underlying purposes of both and avoids the harsh result approved by the court below. (*See* Br. 27-29).

The adoption of petitioner's position—that an FYCA conviction for which an offender serves a short term of probation and is unconditionally discharged should not be used as the basis upon which to impose a recidivist penalty—furthers the FYCA's statutory purpose of giving deserving youth offenders a second chance. It also serves the purpose of Congress in providing the enhanced penalty under section 22-3204 insofar as that felony penalty will be targeted at those incorrigible offenders who by their records merit more severe punishment.

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[9] *See* 99 Cong. Rec. 6421-6423; 6631-6633 (1953); H.R. Rep. No. 514, 83d Cong., 1st Sess. 3-4 (1953); S. Rep. No. 364, 83d Cong., 1st Sess. 3-4 (1953); H.R. Rep. No. 3244, 81st Cong., 2d Sess. (1951); H.R. Rep. No. 538, 82d Cong., 1st Sess. (1951); and S. Rep. No. 1989, 82d Cong., 2d Sess. (1952).

CONCLUSION

For these reasons stated in Petitioner's principal brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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NO. 81-6756-CSY	TITLE Melvin E. TUTEN, Petitioner v. United States

DOCKETED	COURT
May 20, 1982	D.C. Court of Appeals

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Linda Gillespie Stuntz
	Counsel for Respondent: Solicitor General
May 20, 1982	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
June 24, 1982	Order extending time to file a response to the petition until July 23, 1982.
July 23, 1982	Memorandum for the U. S. in opposition filed.
July 29, 1982	DISTRIBUTED. SL14P1.
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are GRANTED.

Nov. 3, 1982	Joint appendix filed.
Nov. 26, 1982	Brief for petitioner filed.
Dec. 22, 1982	Order extending time to file the respondent's brief on the merits until Jan. 5, 1983.
Jan. 6, 1983	Brief for the respondent U. S. filed.
Jan. 19, 1983	CIRCULATED
Feb. 25, 1983	Reply brief for the petitioner filed. (D).
March 1, 1983	ARGUED.